

# U.S. Government Shutdown Impacts SEC Operations, EDGAR and Other Filings, Enforcement and Regulatory Activities

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In response to the U.S. government shutdown that began on December 22, 2018, the U.S. Securities and Exchange Commission and its Divisions of Corporation Finance and Investment Management published public guidance regarding the impacts on their operations. Although electronic filings will continue to be accepted in many cases, as described below, nearly all SEC operations, including the review and processing of filings and enforcement and regulatory functions, will be curtailed. Issuers and practitioners should make contingency plans to address the effects upon ongoing or planned securities offerings, filings, and requests for interpretive guidance, among other things.

## **SEC operational status: Government shutdown impact**

The SEC published its operations plan under a lapse in appropriations and government shutdown (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>), which went into effect on December 27, 2018. During the shutdown, the SEC will have limited operations and limited staff. 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. In summary, during the shutdown, while SEC systems will continue to accept various electronic filings and submissions, the SEC staff will discontinue:

- processing and approvals of '33 Act filings and registrations, including review and acceleration of effectiveness of registration statements;
- ongoing enforcement litigation, except for emergency enforcement matters;
- all non-emergency rulemaking, interpretive advice, and no-action letters;
- processing new and pending exemptive relief applications;
- approving applications for registration by investment advisers;
- processing proposed self-regulatory organization (SRO) rule changes, including NYSE and Nasdaq rule changes;

## **Related People**

- Paul Thompson

## **Related Capabilities**

- Corporate Governance & Compliance
- Mergers & Acquisitions
- Government Enforcement & Corporate Investigations

- responding to requests for information under the Freedom of Information Act, absent compelling need;
- responding to tips, complaints, or referrals, although limited staff will attempt to respond to certain critical matters, including allegations of ongoing fraud and misconduct; and
- responding to complaints, questions, or requests for information.

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.

**EDGAR Filings and Rulemaking.** The shutdown will not affect the ability to submit EDGAR filings. Additionally, SEC personnel will be able to process requests for EDGAR access codes and password resets and answer questions about fee-bearing EDGAR filings and other emergency questions regarding EDGAR submissions. The Divisions of Corporation Finance, Investment Management, and Trading and Markets, and the Office of Compliance Inspections and Examinations, however, will not process filings, provide non-emergency interpretive advice, issue no-action letters, or conduct any other normal Division and Office activities. The SEC will discontinue all non-emergency rulemaking and processing new or pending applications for exemptive relief. New or pending registration statements and applications for exemptive relief will not be processed regardless of the status of any review of those filings. The Division of Corporation Finance also published a set of Frequently Asked Questions (FAQs), discussed below, regarding Issuers' options with respect to new and ongoing securities offerings during the shutdown.

**Division of Corporation Finance FAQs.** The SEC's Division of Corporation Finance (CorpFin) has posted on its website additional guidance regarding the impact of the shutdown (See, <https://www.sec.gov/page/corpfm-section-landing>). A limited number of CorpFin staff members are available during the shutdown to answer questions relating to fee calculations for EDGAR filings, but will not generally be available to respond to other questions. Issuers and their representatives seeking assistance in calculating a filing fee for a filing during the shutdown should submit their requests to [CFEmergency@sec.gov](mailto:CFEmergency@sec.gov). CorpFin also provided a series of FAQs containing guidance with respect to ongoing and new offerings of securities during the shutdown:

- If a company with an effective registration statement determines it must update the information in its prospectus before commencing its offering, it should not go forward with the offering without updating the 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 that amendment effective.
- Similarly, a company with a previously qualified Form 1-A that must be updated should not go forward with its offering before updating its offering statement. The staff will not be in a position to qualify a post-qualification amendment filed on EDGAR.
- If a company does not price its offering within the 15-day time period provided in Rule 430A, the CorpFin FAQs indicate 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.

- The CorpFin FAQs indicate that 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.

**Investment Adviser Registration Depository (IARD) system.** 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 under the Advisers Act. As a result, new or pending investment adviser applications will not be processed.

**Division of Investment Management FAQs.** The SEC's Investment Management (IM) also posted additional guidance regarding the impact of the shutdown (See, <https://www.sec.gov/investment-management>). Investment companies can continue to make filings on EDGAR during the shutdown, but the 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. The IM guidance notes that 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 Corp Fin, described above, with regard to the acceleration of initial registration statements and other types of filings made by registered investment companies during the federal government shutdown. Questions relating to calculating filing fees should be directed to [IMEmergency@sec.gov](mailto:IMEmergency@sec.gov).

**Central Registration Depository (CRD) and Transfer Agent Registration Systems.**

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.

**Electronic Form Filing System (EFFS).** The EFFS will continue to accept submissions by self-regulatory organizations (SROs), but any SRO proposed rule change submitted through EFFS 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.

**Enforcement/Litigation.** The Division of Enforcement will have only a limited staff, and ongoing litigation, examinations, and investigative work will be suspended, except for limited emergency enforcement matters, including 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 process referrals from SROs and others to identify matters that are emergencies and take follow-up steps relating to such emergencies. The SEC also will continue 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.

**Emergency Contacts.** Page 16 of 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 are available to respond to emergency situations.