

The U.S. Federal Shutdown – Some Impacts on Our Clients

January 21, 2018

The U.S. federal government shutdown, which began Saturday, affects different federal branches and agencies in different ways. During a lapse in appropriations, like the one currently in effect, the Anti-Deficiency Act restricts the conduct of business by the federal government, its agencies and their employees. Guidance from the Attorney General over the years has established certain exceptions, notably including emergency functions and functions that have a continued source of funding, and agencies are required to prepare and publish plans for their operations during a shutdown.

This memorandum summarizes how the shutdown can be expected to affect certain areas of the federal government that are of particular interest to many of our clients. This is based on what we know today, but more details may emerge and the situation at any department or agency could change if the shutdown continues.

If you have any questions concerning this memorandum, please reach out to your regular firm contacts.

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Tax Matters

The Treasury Department and the Internal Revenue Service are subject to the shutdown, and it comes at a particularly bad time for them because of the significant amount of work they need to do to address the tax law changes enacted at the end of December and effective immediately. This work includes preparing guidance for taxpayers and tax return preparers, revising tax forms, and revising software for reading the new tax forms and accepting them through e-file. While collecting taxes is obviously important to the running of the government, work on all or substantially all of these tax reform related projects will cease until the government re-opens.

This is particularly unfortunate for taxpayers seeking guidance on how the new tax law will be interpreted in order to inform their current decision-making and the preparation of their 2017 financial statements.

Antitrust Agencies

The Federal Trade Commission and the Antitrust Division of the Department of Justice are the agencies with federal antitrust enforcement authority. Both will be affected by the shutdown. Based on existing shutdown contingency plans and information we have obtained from people at the agencies, we understand that they will both be open Monday morning with full staffing but will promptly reduce their staffing down to excepted employees. The FTC may do so in as little as four hours. For any pending matter, it may be advisable to contact responsible staff attorneys Monday morning to discuss what is likely to happen with the matter during the shutdown. After an employee is furloughed as a result of the shutdown, that employee will not be allowed to conduct any government business. They will not even be allowed to respond to emails.

The shutdown will not affect existing waiting periods for Hart-Scott-Rodino filings, and the Premerger Notification Office will continue to accept new filings during the shutdown. We expect that for any matter involving a significant antitrust issue in which a waiting period is running, the agency may make a request of the parties to agree to extend the waiting period by a number of days equal to the length of the shutdown. If

a transaction has been notified and is in the initial waiting period, the agency may make a request that the parties pull and refile the notification. If parties to a transaction are in pre-filing discussions with one of the agencies, the agency might also suggest that the filing be delayed. Parties will have no obligation to agree to any extension of time but it might be advisable to do so in particular situations to avoid a protective second request or court challenge. We do not expect the shutdown to have any impact where a transaction raises no antitrust concerns.

We do not expect that the shutdown will have any effect on the timing of the DOJ's lawsuit challenging the AT&T/Time Warner merger. Although the DOJ might as a matter of policy make a formal request to stay proceedings in all pending cases – this was done during the 2013 government shutdown – judges have no obligation to grant such requests and the judge who is presiding over the AT&T case has indicated that he would not be inclined to delay the proceedings. Most or all members of the DOJ's trial team will be excepted and will continue to work during the shutdown. Trial is scheduled for March 19.

Bank Regulatory Agencies

The shutdown will not directly affect the federal agencies responsible for regulating financial institutions because they do not depend on congressional appropriations to fund their operations. As a result, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Federal Reserve, and the Consumer Financial Protection Bureau will each remain open as usual throughout the shutdown.

The Treasury Department, including the Financial Crimes Enforcement Network, will be subject to the shutdown and is reportedly expected to furlough nearly 90 percent of its workers. Treasury Secretary Mnuchin's team at Treasury has been active in trying to move a regulatory reform agenda forward, and this work will no doubt be impaired during the shutdown.

Securities and Exchange Commission

The SEC posted a brief notice on its website on Friday, January 19, saying that it "will remain open for a limited

number of days, fully staffed and focused on the agency's mission.” We do not know how long the SEC will continue operating if the lapse in appropriations continues. That presumably depends on the state of its funding and possibly on guidance from elsewhere in the government, and we are not aware of any specific indications on the subject.

The following paragraphs consider some of the issues that would arise if the SEC does shut down, assuming that it would follow the operations plan that it published on December 4, 2017 in anticipation of a possible shutdown in the near future.

The EDGAR system would stay open, because it is operated by a contractor, so filings can continue to be made, and required fees can continue to be paid. So, for example, companies can file registration statements or amendments, prospectuses or free-writing prospectuses, proxy materials and so on. A company will be readily able to complete a takedown from an effective S-3 or F-3 shelf registration statement. A shutdown will not suspend filing requirements, including, for example, current reports on Form 8-K or Form 6-K, beneficial ownership reports under Schedule 13D or Section 16, and soliciting materials under Rule 14a-12 and Rule 425.

However, if the SEC were to shut down, action from the SEC staff would generally not be available – for example, to declare a registration statement effective, to issue a no-action letter, to provide comments on filings or consider an issuer’s responses, or to grant a waiver.

That situation would present challenges for an initial public offering, which requires that a registration statement be declared effective. Normally the deal team requests effectiveness shortly before pricing, but to permit pricing during an SEC shutdown, teams are considering requesting effectiveness earlier. This can raise questions about how to disclose new issuer information after effectiveness (since a post-effective amendment could not be declared effective) and about implications for the issuer if the offering is abandoned. The unavailability of the SEC staff will also take away some options for upsizing or downsizing an offering.

Similarly, an M&A transaction that contemplates the issuance of securities as consideration could suffer delays if the SEC staff is not available to clear comments or to declare the registration statement effective.

In some circumstances, however, companies may be able to proceed during an SEC shutdown without SEC review that would ordinarily be expected. For instance, a preliminary proxy statement for a cash merger may avoid substantive review by the SEC staff – depending on the length of the SEC shutdown – as Rule 14a-6 only requires a company to file a preliminary proxy statement 10 calendar days in advance of filing the definitive proxy statement. Similarly, some Schedule TOs for cash tender offers may also avoid substantive review, depending on the length of an SEC shutdown and the expiration date of the tender offer, since SEC approval of a Schedule TO is not required. It is conceivable that taking advantage of a short SEC shutdown to move along an all-cash M&A transaction (by either mailing a definitive proxy statement or setting an imminent expiration date for a tender offer, without having received a “no review” or “no comments” confirmation from the SEC staff) may result in an awkward situation where, once the SEC shutdown is over, the SEC staff elects to intervene with late stage comments that disrupt the transaction timeline.

A prolonged shutdown might also have an impact on the corporate proxy season. A preliminary proxy statement, if required, must still be filed at least 10 calendar days before the definitive proxy statement is first sent to shareholders, but the SEC staff will not comment and no SEC action is required for mailing. However, if there is an SEC shutdown and it continues, an issuer seeking to exclude a shareholder proposal from its proxy statement under Rule 14a-8 will face uncertainty about whether and when the staff will be able to process no-action letter requests. If no-action relief is not available, an issuer would face a difficult tactical decision about whether to proceed to exclude the proposal without the SEC staff’s views.

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