

The Potential U.S. Federal Shutdown – Planning Considerations for Our Clients

September 26, 2023

A U.S. federal government shutdown could begin at the end of this month if Congress cannot agree on new appropriations beyond September 30, 2023. The timing and impact at individual government agencies will vary, but prior experience from the most recent shutdown that began in December 2018 gives us an outline of the considerations relevant to our clients.

Although September 30 is a relevant deadline, its impact will not be uniform. Some agencies have funding that isn't dependent on appropriations and will be unaffected, while others will be able to continue normal operations for several days or weeks depending on when they exhaust their existing appropriations, including any surpluses from prior budget cycles. Some agencies have announced approximate timelines for curtailing operations, and in the absence of action by Congress, additional announcements are likely to be made.

When a department or agency that doesn't have other sources of funding reaches the point where its appropriations have fully lapsed, the [Anti-Deficiency Act](#) restricts the conduct of business by that entity and its employees. Guidance from the Attorney General over the years has established certain exceptions, notably including emergency functions, and agencies are required to prepare and publish plans for their operations during a shutdown.

This memorandum summarizes how the potential 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've learned from previous shutdowns, but more details will likely emerge as individual departments or agencies evaluate their situations, and we expect announcements will be made as we approach month-end.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

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Antitrust Agencies

The Federal Trade Commission and the Antitrust Division of the Department of Justice share federal antitrust enforcement authority. Both will be affected by the shutdown. Based on existing [shutdown contingency plans](#) and other available information, we understand that they will both be open on Monday, October 2nd with full staffing. The DOJ would then quickly reduce staffing down to excepted employees. We understand that due to leftover funding from the prior fiscal year, the FTC could remain fully operational for as long as three weeks.

Statutory merger review waiting periods under the HSR Act will continue to run during the shutdown. The agencies also will continue to accept HSR filings for new transactions. However, office hours at the FTC's Premerger Notification Office may be reduced, and staff will not be available to answer filing questions. If a notified transaction involves a significant antitrust issue and the matter is in its initial waiting period, staff may request that the parties pull the notification and refile before the waiting period expires. If a Second Request has already been issued, staff may request that the parties agree to extend the waiting period by a number of days equal to the length of the shutdown. Parties have no obligation to agree to these extensions, but it may be advisable to avoid either a defensive Second Request in the first instance or the filing of a pre-emptive lawsuit.

Some staff at both agencies may be excepted in order to continue ongoing merger investigations. The FTC's contingency plan suggests that if a failure to challenge a transaction before it is consummated will result in substantial impairment of the government's ability to secure effective relief later, the FTC will continue an investigation during the shutdown. The DOJ's plan states that staff will continue investigations where a waiver cannot be secured and allowing a merger to go forward would pose a reasonable likelihood of peril to property in which the United States has an immediate interest. 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.

At the FTC, any non-merger investigations will be suspended, except as necessary to prevent statutes of limitations from precluding monetary remedies available to the FTC, and the agency will stop work on its new proposed non-compete rules and merger guidelines. All FTC administrative litigation will be stayed. The DOJ will continue to prepare for scheduled criminal trials and to work on ongoing criminal trials.

At both agencies, staff working on active litigation in federal courts will seek a stay. If the judge denies the stay, relevant staff will be allowed to continue working. All civil investigative demand (CID) and subpoena deadlines will be extended by the length of the shutdown. If possible, the agencies may choose to delay filing a lawsuit in order to avoid the impact of the shutdown.

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. At the time this alert was published, Treasury had not posted its contingency plan but we expect that will change in the next several days.

Securities and Exchange Commission

During each of the two prior shutdowns, the SEC posted brief website notices that it would remain fully operational for a "limited number of days" after the start of the shutdown. We expect a similar announcement in the coming days, but the actual length of time for continued operations will depend on the state of the SEC's funding.

Various issues would arise if the SEC does shut down, assuming that it follows the [SEC Shutdown Plan](#) that it published in July 2023.

- **EDGAR Status**

The EDGAR system is operated pursuant to a contract, so would remain fully functional as long as funding for the contractor remains available through permitted means.

As long as EDGAR remains fully functional, filings can continue to be made, and required fees can continue to be paid. So, for example, companies can file registration statements, and amendments to registration statements, prospectuses, prospectus supplements, free writing prospectuses, proxy materials and so on.

- **SEC Staff Availability**

The SEC staff would be available to answer questions about fee-bearing EDGAR filings and other emergency questions regarding EDGAR submissions.

However, the SEC would be unable to declare registration statements effective, issue no-action letters, provide comments on filings, consider an issuer's responses, grant waivers or qualify Form 1-A offering statements.

- **Capital Markets Access and M&A Transactions**

A company would be readily able to complete a takedown from an effective S-3 or F-3 shelf registration statement. That is, both WKSI and non-WKSI issuers with an effective shelf registration statement will be able to complete takedowns and file their prospectus supplements on EDGAR since the system will remain open. However, non-WKSI issuers that do not have an effective shelf registration statement should consider submitting acceleration or qualification requests as soon as practicable while the SEC remains open because such requests would not be accommodated once the SEC shuts down.

If a non-shelf registration statement is declared effective prior to the SEC shutdown, under Rule 462(c), issuers may file a 424(b) prospectus

supplement to supply the pricing information if pricing occurs after the SEC shutdown but within 15 business days after the effective date. If a registration statement is effective, but pricing occurs later than 15 business days after the effective date, a post-effective amendment can be filed pursuant to Rule 462(c) to restart the 15 business day period; such amendments are effective upon filing, which provides companies significant flexibility to make an offering later on while the SEC is closed. Importantly, Rule 462(b) does not allow issuers to make substantive changes in the final prospectus supplement from, or additions to, the prospectus in the effective registration statement.

Once the shutdown is in effect, issuers with registration statement that do not become effective immediately upon filing can choose to remove the delaying amendment so that their registration statement will automatically become effective in 20 days. If the SEC's shutdown continues and an issuer wishes to further delay the effective date of their registration statement, they may file another pre-effective amendment during the 20-day period. Once the SEC reopens, the issuer could file an acceleration request if their registration statement is not yet effective. 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 pricing information of the offering.

The shutdown would present unique challenges for an initial public offering, which requires that a registration statement be declared effective. Normally the deal team requests effectiveness shortly before pricing, and removing the delaying legend and waiting for the end of the 20-day period is a clumsy substitute. 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 would

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.

- **Filing Deadlines**

It is important to note that a shutdown would not suspend filing requirements, including, for example, current reports on Form 8-K or Form 6-K, beneficial ownership reports on Schedules 13D or 13G or under Section 16, and soliciting materials under Rule 14a-12 and Rule 425.

- **Potential Impacts on Non-Calendar Year Companies That Need to Solicit Proxies**

A prolonged shutdown may also have an impact on any non-calendar year companies that will be in their 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 would not comment, and no SEC action would be required for mailing. Separately, if an SEC shutdown 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 SEC staff will be able to process no-action letter requests. We expect issuers will be able to timely file no-action letter requests through the SEC’s email system, though they will not be reviewed until the shutdown ends. 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.

- **SEC Materials, Questions and Answers**

As a further aid to clients, we have reproduced as an appendix an updated set of FAQs based largely on a multi law-firm memo that was produced for the December 2018 shutdown. These FAQs are subject to change as the SEC makes announcements about its specific plans for this anticipated shutdown.

The SEC’s announcement regarding the late 2018 shutdown and related Questions and Answers may be found [here](#).

The SEC’s July 2023 Operations Plan Under a Lapse in Appropriations and Government Shutdown (SEC Shutdown Plan) is available [here](#).

Tax Matters

It is currently unclear how the IRS will respond if appropriations lapse on October 1, 2023; it has not yet published its contingency plan for fiscal year 2024. The extent of the shutdown’s effect on IRS operations depends on whether the IRS taps the multi-year funding provided to it in 2022 by the Inflation Reduction Act (IRA). In any event, if the IRS follows its past practice during shutdowns, it will continue to process returns and issue refunds.

In August 2022, upon enactment of the IRA, the IRS received approximately \$80 billion in funding for taxpayer services, enforcement, operations support,

and business systems modernization.¹ These funds are available to the IRS until September 30, 2031. The IRS generally can use these multi-year funds to fill a lapse in its annual appropriation; the Anti-Deficiency Act only restricts agencies from spending funds *exceeding* an amount already appropriated for a given purpose.² The dedicated IRA funding therefore gives the IRS some room to maneuver in the event of a shutdown. The question is whether the IRS will tap this supplemental funding in the event of a shutdown.

If the IRS taps its IRA funding—if it adopts the same contingency plan it adopted last year—then it can remain fully operational during a shutdown.

Last year the IRS indicated that it would remain in operation. In September 2022, less than a month after the IRA was enacted, it published with Treasury’s approval its lapsed appropriations contingency plan for fiscal year 2023.³ It stated that “[w]ith th[e] funding” provided by the IRA, “the IRS will not experience a lapse in appropriations on October 1, 2022, and normal IRS operations will continue.” It provided that all of its employees (approximately 83,000 as of July 2022) would be retained under the category “Compensation is financed by a resource other than annual appropriations.”

The “normal IRS operations” that would have continued during a shutdown included not only processing returns and issuing taxpayer refunds, but also functions such as preparing regulatory guidance, conducting audits, and litigating tax disputes.

If the IRS does not utilize its IRA funding, then it will continue to process returns and issue refunds, if it follows past practice. But other functions will be interrupted.

In 2023, the IRS indicated that it would like to avoid relying on its multi-year funds during a gap in annual funding. In its IRA Strategic Operating Plan published earlier this year, the Commissioner stated that “[a]ny

reduction in annual discretionary funds . . . will require IRA funding to be shifted to general operations” and that “[t]his would be to the detriment of the service, technology, and compliance initiatives envisioned to transform the IRS.”⁴

Regardless of the path it chooses, the IRS will likely continue to process returns and issue refunds, as it did during the fiscal year 2019 shutdown.⁵ These functions may fall under the Anti-Deficiency Act’s exception for services “for emergencies involving . . . the protection of property.”⁶ Taxpayers with extended filing deadlines on October 16, 2023, therefore likely will have their returns processed and any refund issued. But to the extent regulatory guidance (*e.g.*, with respect to IRA tax credits) and letter rulings are delayed, it may interfere with taxpayer planning and create transactional delays.

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¹ Inflation Reduction Act, Pub. L. No. 117-169, § 10301, 136 Stat. 1818, 1831–33.

² 31 U.S.C. § 1341(a)(1)(A)

³ *IRS Fiscal Year 2023 Lapsed Appropriations Contingency Plan* (Sept. 8, 2022).

⁴ *IRS IRA Strategic Operating Plan*, p. 3 (Apr. 5, 2023).

⁵ *See, e.g.*, GAO, B-331093, Oct. 22, 2019, 3–4 (discussing the IRS’s contingency plans and tax return activities during the fiscal year 2019 lapse in appropriations).

⁶ 31 U.S.C. § 1342

APPENDIX

Potential SEC Shutdown: Frequently Asked Questions and Indicative Answers About the Impact on Capital Markets Transactions and Public Companies

September 26, 2023

The SEC has not announced its operational status should there be a federal government shutdown after September 30, 2023. The following questions and answers reflect the SEC's prior guidance during the two federal government shutdowns in 2018-2019⁷ and the SEC's July 2023 *Operations Plan Under a Lapse in Appropriations and Government Shutdown*, available at <https://www.sec.gov/files/sec-plan-operations-during-lapse-appropriations.pdf> (SEC Shutdown Plan).

This Q&A is provided only as an indicative guide, as the SEC's approach in the upcoming shutdown may vary from the approach taken in prior shutdowns.

GENERAL

1) Q: Where should I look for the latest official SEC information on an SEC Shutdown?

A: Any changes to the SEC operational status will be announced on the SEC's website, www.sec.gov.

EDGAR ISSUES

2) Q: Will EDGAR accept filings?

A: Yes, the SEC Shutdown Plan states that because EDGAR is operated pursuant to a contract, it "will remain fully functional as long as funding for the contractor remains available through permitted means."

3) Q: Will SEC Staff members be available to resolve EDGAR filing issues?

A: Yes, but on a severely limited basis. According to the SEC Shutdown Plan, the SEC staff will be available to "answer questions about fee-bearing EDGAR filings and other emergency questions regarding EDGAR submissions."

FILINGS

4) Q: Will SEC examiners be available to process filings?

A: No.

5) Q: Will automatically effective Securities Act registration statements and automatically effective post-effective amendments go effective when filed?

A: Yes.

6) Q: Will other Securities Act registration statements and post-effective amendments be declared effective or accelerated?

A: No.

⁷ This Q&A is in part based on the prior SEC guidance on the January 2018 government shutdown (as memorialized by an 18 Law Firm Consensus Report published on January 22, 2018).

7) **Q: Will initial Exchange Act registration statements under Section 12(g) go effective 60 days after filing?**

A: *Yes.*

8) **Q: Will initial Exchange Act registration statements under Section 12(b) be declared effective by the SEC?**

A: *No.*

9) **Q: Will the SEC Staff make an exception and declare effectiveness *after* an SEC Shutdown if comments on a Securities Act or Exchange Act registration statement were cleared *before* an SEC Shutdown?**

A: *No.*

10) **Q: What happens if I have an effective registration statement and I determine that I must update the information in my prospectus before commencing my offering?**

A: *You should not go forward with your offering before updating your prospectus. The company and its representatives will have to decide whether the company can update the prospectus without filing a post-effective amendment. If you file a post-effective amendment on EDGAR, the SEC staff will not be in a position to declare that amendment effective.*

11) **Q: What happens if I have a previously qualified Form 1-A and I determine that I must update the information in my offering statement before commencing or continuing my offering?**

A: *You should not go forward with your offering before updating your offering statement. If you file a post-qualification amendment on EDGAR, the SEC staff will not be in a position to amend that amendment.*

12) **Q: A Securities Act registration statement omitting pricing and related information as permitted by Rule 430A is declared effective prior to an SEC Shutdown. May the issuer file a prospectus under Rule 424(b)(1) to supply the omitted information if pricing occurs after an SEC Shutdown but within the time period provided by Rule 430A(a)(3) (i.e., 15 business days after the effective date)?**

A: *Yes, because the issuer's registration statement was declared effective prior to the shutdown, the issuer is eligible to use Rule 430A and it 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 the issuer 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, the issuer 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: Issuers 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.

13) **Q: Can I file a new registration statement without a delaying amendment during the shutdown?**

A: *Yes. But if our operating status changes during the 20-day period, we may ask you to amend the document to include a delaying amendment.*

- 14) **Q: Once 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?**

A: 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: Simply omitting the delaying amendment from an amendment will not begin the 20-day period. 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 SEC staff.

- 15) **Q: Can I amend to remove the delaying amendment while I have outstanding, unresolved SEC staff comments on my filings?**

A: Yes, but the company is still responsible for the completeness and accuracy of the disclosure and the SEC staff may ask the company to further amend the filing to include the delaying amendment if the SEC's operational status changes prior to the effective date.

- 16) **Q: The Division of Corporation Finance's policy allowing confidential submission of certain Securities Act and Exchange Act registration statements requires issuers to file publicly at least 15 days before the road show in the case of an IPO (or before effectiveness, if there is no road show), and at least 48 hours before effectiveness in the case of a follow-on offering. Will the 15-day or 48-hour period run during an SEC Shutdown?**

A: Yes. However, the SEC staff will not be available to declare the registration statement effective.

- 17) **Q: Will it be possible to pay filing fees during an SEC Shutdown?**

A: Yes, including on a "pay-as-you-go" basis for automatic shelf registration statements.

- 18) **Q: Should all Exchange Act current and periodic filings be made by their due date?**

A: Yes, including filings such as proxy statements and Forms 10-K, 10-Q, 8-K, 3 and 4, as well as Schedules 13D and 13G.

- 19) **Q: Should a company still file preliminary proxy materials, if required by Exchange Act Rule 14a-6(a)?**

A: Yes, a company should still file preliminary proxy materials in accordance with Rule 14a-6(a), which provides that the preliminary proxy materials must be filed at least 10 calendar days prior to the date the definitive proxy materials are first sent or given to security holders. If the company is not advised by the SEC staff that the preliminary proxy materials will be reviewed prior to the expiration of the 10-day

period contemplated by the rule, then the company could proceed with disseminating and filing the definitive proxy materials.

- 20) **Q: Should a company still respond to an SEC comment letter on a Securities Act or Exchange Act filing, including by the requested due date in the case of a comment on an Exchange Act periodic or current filing?**

A: Yes, a company should still respond to SEC comments. In the case of comments on Exchange Act periodic or current filings specifying a response date, the company can either respond by the due date or submit a letter (as EDGAR correspondence) advising the SEC staff of the new response date if the company is unable to respond by the requested deadline.

INTERPRETIVE GUIDANCE

- 21) **Q: Will it be possible to obtain answers from the SEC Staff to routine interpretive questions?**

A: No. The SEC Shutdown Plan states that “nonemergency interpretive advice” will be discontinued.

- 22) **Q: Will it be possible to obtain no-action relief from the Division of Corporation Finance?**

A: No, including with regard to shareholder proposals. During an SEC Shutdown, a company should make the submission required by Rule 14a-8(j) via email if it intends to exclude a shareholder proposal. The SEC staff will not, however, respond until after the SEC Shutdown ends. If the SEC Shutdown is continuing at the time the company disseminates and files its definitive proxy statement, it would have to decide whether to exclude the proposal without the benefit of a no-action letter.

MISCELLANEOUS

- 23) **Q: Will the Division of Corporation Finance consider a request for emergency relief under Rule 3-13 of Regulation S-X?**

A: 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. Submit requests to CFEmergency@sec.gov and describe the emergency and the significant property interest to be protected.

- 24) **Q: Will the SEC’s online database of stop orders remain available, and will it be updated in the event a stop order is issued?**

A: Yes. The online database can be found at:

<http://www.sec.gov/litigation/stoporders.shtml>.

- 25) **Q: Will an SEC Shutdown change what constitutes a “business day” for purposes of the Securities Act, Exchange Act or the SEC’s rules under those statutes?**

A: No, except for purposes of certain rule-making notices filed by self-regulatory organizations (covered here: <http://www.sec.gov/rules/final/2011/34-64251.pdf>).

This means, for example, that the “business day” count for purposes of Rule 430A, Rule 13e-3, Rule 13e-4, Regulation 14D, Regulation 14E (including the 20 business day requirement of Rule 14e-1) and Regulation M will not be affected by a shutdown.