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Industry Update

The Impact on Issuers of a Possible Government Shutdown

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This client alert has been updated below to reflect the SEC's updated guidance issued on Oct. 9.

The U.S. government's current fiscal year ends on Sept. 30. If Congress does not pass an appropriations bill or a continuing resolution (which temporarily extends funding) by Oct. 1, a government shutdown will occur.

During a shutdown, nonessential functions cease until funding is restored. This will significantly reduce SEC operations. SEC staff will not be available to consider acceleration requests, declare registration statements effective, provide interpretive advice, issue no-action letters or conduct other routine activities.

When a shutdown is possible, issuers with substantially complete and compliant registration statements should consider requesting effectiveness while the SEC is still operational. The SEC advises issuers that may seek acceleration before a shutdown to notify their examiners promptly to resolve outstanding issues. For issuers awaiting the required FINRA "no objection" statement, the SEC may still consider acceleration if underwriters confirm they will not execute the underwriting agreement or confirm sales until the statement is received. In such cases, issuers should also notify FINRA of their plans.

Issuers that are not well-known seasoned issuers (WKSIs) but are contemplating a future offering and want to avoid shutdown risk should consider filing a shelf registration statement (if eligible) and seek effectiveness as soon as practicable.

EDGAR Will Remain Operational

EDGAR is expected to remain functional, provided contractor funding continues (as it has in prior shutdowns). Limited SEC staff will be available to issue filer access codes and answer emergency EDGAR questions.

Timely Filings Still Required

Public companies must continue to meet SEC periodic filing deadlines, including Form 10-Q, Form 8-K and Section 16 filings. The shutdown does not alter what constitutes a "business day" for reporting deadlines.

Securities Offerings: Impact and Planning

Category	Actions Before Shutdown	Options During Shutdown
WKSIs	None	Registration statements on Form S-3/F-3 will continue to go effective automatically. WKSIs with effective shelves can proceed with takedowns and prospectus supplements. Filing fees will still be accepted.
Non-WKSIs with effective shelves	None	May conduct shelf takedowns and file prospectus supplements, including on Form S-1/F-1 for secondary offerings. Eligible EGCs may continue to forward incorporate by reference information into Forms S-1.
Non-WKSIs filing new registration statements	Seek effectiveness before shutdown	New filings on Form S-1/F-1/S-3/F-3 do not go effective automatically; SEC will not review, confirm no-review or declare effective. If effectiveness was not obtained before the shutdown, issuers may consider removing the delaying amendment (see “Mechanics of the Removing the Delaying Amendment” below).
Issuers conducting IPOs or primary offerings on Form S-1/F-1	Seek effectiveness before shutdown	The SEC's latest guidance, published on Oct. 9, provides that issuers conducting IPOs and primary offerings on Form S-1/F-1 may also consider removing the delaying amendment in order to go effective, even if they are relying on customary Rule 430A backfilling mechanics to omit pricing and other information from their registration statement. This represents a change from the SEC's historic position that Rule 430A backfilling mechanics are not available to registration statements that go effective by operation of law.

Rule 430A Timing Considerations

Once declared effective, issuers relying on Rule 430A to backfill pricing and other information must price within 15 business days or file a Rule 462(c) automatically effective post-effective amendment to restart the clock. Note that 462(c) amendments cannot include substantive changes. If substantive changes are needed, the issuer must wait until the SEC reopens to declare the amendment effective.

Mechanics of Removing the Delaying Amendment

If an issuer amends its registration statement to remove the delaying amendment under Rule 473(b), the registration statement becomes effective automatically in 20 days.

Risks Associated With Removing the Delaying Amendment

Issuers should weigh the risks carefully. The antifraud provisions apply, and the SEC may still issue a stop order or require amendments after reopening. Before pursuing this path, issuers should evaluate their facts and circumstances (e.g., S-3 eligibility, repeat issuer status, review history, unresolved comments) and ensure the registration statement is final and complete.

Companies May Still Send Proxy Materials

Companies may continue to file preliminary proxy statements and may mail definitive proxy materials 10 days later. However, the SEC may review the preliminary proxy statement once operations resume. No-action requests to omit shareholder proposals under Rule 14a-8 will not be addressed during a shutdown.

The SEC's latest guidance on actions in advance of a potential government shutdown is [available here](#).

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