

01 / 27 / 19

US Government Shutdown Ends – SEC Issues Guidance to Address Significant Backlog of Filing Reviews and Shareholder Proposals

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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On January 25, 2019, President Donald Trump signed into law a continuing resolution that immediately reopened the federal government through February 15, 2019. The three-week continuing resolution is a welcome development, particularly for the initial public offering (IPO) market that largely was frozen during the government shutdown.

On January 27, 2019, the Division of Corporation Finance (staff) of the Securities and Exchange Commission (SEC) published transition guidance that explains how the staff will tackle the backlog of transactional and disclosure filings as well as shareholder proposals that accumulated in the days immediately prior to and during the shutdown, when the staff was prohibited from working. The transition guidance makes clear that, absent compelling circumstances, the staff generally will prioritize filings, submissions and requests for staff action, including shareholder proposals, in the order they were received. While the staff will be available to answer substantive and procedural questions related to filings and other federal securities law matters, the transition guidance cautions that their response times may be longer than ordinary. Issuers that need assistance on an expedited basis are advised to submit their request, contact information and the reason they believe expedited treatment is necessary to CFEmergenc@sec.gov.

Below, we briefly identify and discuss certain issues that companies should consider as the SEC works toward regular way operations.

IPO Challenges

The shutdown has significantly impacted companies seeking to go public in the first quarter of 2019 and may continue to affect them even as the SEC reopens.

Third Quarter Financial Statement Staleness Is Fast Approaching. For calendar year-end issuers, third quarter interim financial statements go “stale” on February 14, 2019.¹ After this staleness date, the staff will not declare a registration statement effective for these issuers unless it is updated to include year-end, audited financial statements. Because many calendar year-end issuers will not be in a position to complete their audits in the next several weeks, we expect that a number of calendar year-end IPO issuers will push to be declared effective ahead of the third quarter staleness date. Even with the new transition guidance, we believe the staff still will attempt to prioritize issuers that have advanced significantly through the comment process and have firm

¹ For any deal that will price or close after February 11, 2019, the deal team should discuss the comfort letter with the issuer’s auditors. While comfort letters may continue to be delivered after the 134th day after the last set of financial statements, the cutoff date for procedures and the level of comfort that may be provided can be impacted.

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plans to start their roadshows.² On the other hand, we anticipate that issuers that are not as far along in the staff review process and IPO timeline will have to amend their registration statements to include updated year-end financial statements.

Removal of the “Delaying Amendment” Will Not Solve Third Quarter Staleness Issue. During the government shutdown, the staff posted guidance describing a narrow path for issuers to proceed with an offering even where the staff was unavailable to declare the registration statement effective. By removing or omitting the delaying amendment language required by Rule 473(a) from the registration statement and, instead, including a statement regarding automatic effectiveness as contemplated by Rule 473(b), an issuer could leverage the power of Section 8(a) to cause the registration statement to go effective automatically 20 calendar days after the filing.³ A number of SPAC issuers and at least two operating companies elected to amend their registration statements to facilitate automatic effectiveness under Section 8(a).⁴

Issuers that have not already taken action to go effective automatically by operation of Section 8(a) to avoid the February 14, 2019, staleness date will be unable to do so at this point, as any registration statement stripping or omitting the delaying amendment language would have been required to be filed before 5:30 p.m. EST on January 25, 2019, to avoid triggering the staleness rules.

Issuers That Previously Omitted or Removed the Delaying Amendment Will Be Considered on a Case-by-Case Basis. As noted above, a number of issuers (including non-IPO issuers) omitted or removed delaying amendments from their registration statements. The transition guidance provides that the staff will consider requests to accelerate the effective date of those registration statements if they are amended to include a delaying amendment prior to the end of the 20-day period.

In cases where the staff believes it would be necessary for an issuer to amend to include or reinsert a delaying amendment (e.g., to resolve outstanding staff comments), the staff will notify the issuer. In cases where the staff has no objection to the issuer's election to omit or remove the delaying amendment, it appears the staff will not intercede to prevent the automatic effectiveness of the registration statement.

² Issuers with a pending confidential treatment request must consider how to expeditiously resolve staff comments on the request, if any.

³ Because of the unavailability of Rule 430A for registration statements that go effective automatically, issuers that chose this route generally had to include all known pricing information in the registration statement filed 20 days prior to effectiveness.

⁴ If any of these issuers did not previously clear staff comments on the registration statement, it is likely that the staff will request that the issuers amend their filing to include the delaying amendment language so the staff satisfactorily can resolve the outstanding comments and declare the registration statement effective under regular way procedures.

Future Government Shutdown Is a Risk. Given that the reopening of governing agencies is as a result of a temporary continuing resolution and not a long-term solution, there is a risk that the government will shut down again after expiration of the continuing resolution on February 15, 2019. Issuers that fail to go effective during the three-week window risk being largely frozen out of the IPO market during any subsequent shutdown.

NYSE and Nasdaq Listing Process. For companies seeking to list a class of securities (e.g., in connection with an IPO or spin-off), we expect the NYSE and Nasdaq to return to their pre-shutdown procedures, whereby companies must resolve all staff comments before the exchanges will approve a listing. As the exchanges did not close during the government shutdown, we do not believe either exchange currently is facing a backlog. However, if large numbers of IPO issuers or spin-off entities attempt to list their securities ahead of the February 14, 2019, staleness date, the spike in listing may strain the exchanges' certification procedures.

Proxy Season, Including Rule 14a-8 Shareholder Proposals

The monthlong shutdown may also have a significant impact on the 2019 proxy season.

Shareholder Proposals. Because of the role the staff plays in the Rule 14a-8 no-action process, the monthlong shutdown undoubtedly has resulted in a significant backlog of shareholder proposal no-action requests. The transition guidance makes clear that the staff generally expects to respond to the no-action requests in the order received. The transition guidance acknowledges that certain companies may have impending print deadlines or that negotiations may have changed the need for the staff's views. In this case, the transition guidance instructs companies to notify the staff at shareholderproposals@sec.gov as soon as possible of any timing constraints or changes in circumstances so that the staff can efficiently prioritize its responses.

Preliminary Proxy Materials. It is possible that the staff will be unable to screen and review as many preliminary proxy statements as it otherwise would under normal conditions. Companies, however, should not change their historical practices and timelines for filing and mailing their proxy materials. As has always been the case, if a company is not advised by the staff that its preliminary proxy materials are going to be reviewed during the 10-day period specified in Rule 14a-6, the company can proceed with filing and mailing definitive proxy materials.

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Comment Letters on Periodic Reports, No-Action Letters and Waiver Requests Under Rule 3-13 of Regulation S-X

The staff historically has attempted to process comment response letters, no-action requests and Rule 3-13 waivers on a standardized timeline (*e.g.*, comments on a no-action letter or Rule 3-13 waiver generally are issued no later than 30 days or 10 days, respectively, from receipt). The transition guidance cautions that response times to these matters “may be longer than ordinary.” It is unclear whether the staff will take the view that any standardized deadlines were deemed tolled for the 34 days the government was shut down. For example, if an IPO issuer submitted a draft registration statement on the day the government shut down, the 30-day review clock would commence on Monday, January 28, 2019. In any event, it may be some time before companies hear back from the staff with respect to submissions made just prior to or during the shutdown.

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