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## SEC Division of Corporation Finance Publishes Guidance for Registrants as Government Shutdown Looms

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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One Manhattan West  
New York, NY 10001  
212.735.3000

On September 27, 2023, facing the prospect of a lapse of appropriations, the staff of the Securities and Exchange Commission's Division of Corporation Finance published a summary of the anticipated impact on its operations of a U.S. government shutdown, along with updated guidance for registrants who have or expect to have filings or matters pending before the staff. During any shutdown, the division's activities will be "extremely limited." This is consistent with the most recent government shutdown, which began in December of 2018 and lasted 34 days.

As explained in more detail below, the staff will not be available to review filings, issue comments or take registration statements effective. Additionally, absent a registrant's ability to demonstrate a reasonable likelihood that the protection of property would be compromised "in some significant degree" by staff delay (which we view as a very high threshold), the staff will not be available to consider requests for exemptive relief.

The most prominent parts of the guidance are summarized immediately below. The full guidance is available [here](#) and at the bottom of this alert.

**EDGAR filings.** The EDGAR filing system will remain open during any shutdown and continue to accept filings, including transaction-related proxy and registration statements, and filing-related correspondence. A limited number of technical staff will be available to process requests for EDGAR codes and answer fee-related questions. Because EDGAR will continue to accept all filings regardless of the staff's operating status, registrants should continue to make all required filings, including periodic and current reports required by the Securities Exchange Act.

**Staff responses.** During the shutdown, the division's legal and accounting staff will not provide any interpretative advice, issue no-action letters (including under Securities Exchange Act Rule 14a-8), review filings (including proxy or registration statements), or process requests for accelerating the effectiveness of registration statements.

**WKSIs and non-WKSIs with effective shelf registration statements.** Well-known seasoned issuers, or WKSIs, will be able to continue to access the public markets because WKSI registration statements on Form S-3 or F-3 are automatically effective upon filing. Likewise, non-WKSIs with an effective shelf registration statement on Form S-3 or F-3 can access the public markets through shelf takedowns and the filing of prospectus supplements on EDGAR.

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**New registration statements.** The staff's guidance addresses a process available to a limited subset of new registration statements (apart from Forms S-3 or F-3 filed by a WKSI) that may become effective without any action by the SEC. For existing registration statements that are not yet effective, companies may choose to remove the "delaying amendment" by filing an amendment to the registration statement that does not include the delaying language required by Securities Act Rule 473, in which case the registration statement will become automatically effective 20 days thereafter. Similarly, new registration statements may omit the delaying amendment and become effective 20 days after the initial filing.

Note that removal or omission of the Rule 473 delaying language to secure automatic effectiveness after 20 days *will not work for a traditional IPO*, as such transactions rely on Securities Act Rule 430A to omit pricing-related information from the registration statement at effectiveness. The SEC staff has long held the view that companies cannot rely on Rule 430A for registration statements that go effective automatically as a result of the passage of time.

On the other hand, business combination transactions on Form S-4 and F-4 and shelf registration statements on Form S-3 or F-3 may remove or omit the Rule 473 delaying language to secure automatic effectiveness after 20 days because they do not rely on Rule 430A.

Where the company does not include or removes the delaying language, as the case may be, the registration statement must include the following language: "*This registration statement shall become effective in accordance with the provisions of Section 8(a) of the Securities Act of 1933.*" Before proceeding in this manner, registrants should consider the risks and factors described in the response to Question 11 in the staff's guidance, "Now that 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?" In particular, the liability and antifraud provisions of the federal securities laws apply to all registration statements, including those that go effective by operation of law pursuant to Section 8(a) of the Securities Act of 1933.

**Post-effective amendments.** Registrants who need to update the information in a prospectus for an effective registration statement by filing a post-effective amendment will be unable to continue with the offering until the shutdown ends and the staff declares the amendment effective.

**Proxy statements.** The staff will not review proxy statements filed in preliminary form during any shutdown. Accordingly, companies may file and mail definitive proxy materials 10 days after the preliminary proxy is filed.

Here is the staff's guidance:

### General

#### 1. How will I know whether the Division's operating status has changed?

Updates on our operating status will be posted on the SEC website.

### Pre-Shutdown

#### 2. If the Division's operating status changes to closed, will the staff be able to grant a request for acceleration of the effective date of my pending registration statement or for qualification of my offering statement?

No. You may wish to consider submitting a request for acceleration or qualification, as applicable, while the Division is open and operating.

When the Division is open and operating, it is our normal procedure to consider all requests for acceleration or qualification, but depending on the circumstances we may not act upon your request.

#### 3. How far in advance should I request acceleration or qualification?

If you think you might request acceleration or qualification in advance of a shutdown, it would be helpful for us to know as soon as possible. We can then work with you to resolve any outstanding issues. We will consider granting requests for acceleration or qualification the day they are submitted.

#### 4. Should I request acceleration or qualification now if I don't know when I want to commence my offering?

The staff will not advise on this question. The company and its representatives will have to decide how to proceed.

#### 5. Can I request acceleration of my pending registration statement if I have not yet received a "no objections" statement from FINRA with regard to my underwriting compensation arrangements?

If you have not yet obtained the required "no objections" statement from FINRA, we will consider granting acceleration requests if the underwriters confirm in their request for acceleration that they will not execute the underwriting agreement or confirm sales of the securities from the registration statement until they receive that statement from FINRA. If you find yourself in this situation, please let FINRA know of your plan to request acceleration as soon as possible.

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### 6. Can I request qualification of my pending Form 1-A offering statement if I have not yet received a “no objections” statement from FINRA with regard to my underwriting compensation arrangements?

If you have not yet obtained the required “no objections” statement from FINRA, we will consider granting qualification requests if the company confirms that the underwriters will not execute the underwriting agreement or confirm sales of securities offered pursuant to the applicable Form 1-A until they receive that statement from FINRA. If you find yourself in this situation, please let FINRA know of your plan to request qualification as soon as possible.

### 7. Can I file a new registration statement without a delaying amendment in anticipation of a shutdown?

As a technical matter, you may. However, if our operating status remains open, you should expect that we would ask you to amend the document to include a delaying amendment.

## During a Shutdown

### 8. 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?

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 staff will not be in a position to declare that amendment effective.

### 9. 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?

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

### 10. If my registration statement was declared effective prior to the shutdown (my effective date was September 30, 2023, or earlier) what happens if I don’t price my offering within the 15-day time period provided in Rule 430A?

Post-effective amendments filed pursuant to Rule 462(c) are effective upon filing. Therefore, regardless of the Division’s operating status, you may file post-effective amendments

under Rule 462(c) to restart the 15-business-day period so that, at the time of pricing, you will be able to include the pricing information in a Rule 424(b) prospectus supplement.

You cannot rely on Rule 462(c) if the post-effective amendment includes substantive changes from, or additions to, the prospectus in the effective registration statement.

### 11. Now that 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?

As a technical matter, you may. All companies, especially those conducting initial public offerings of securities, should consider carefully the risks of this course of action and should evaluate their particular facts and circumstances before doing so. Factors to consider may include, but are not limited to, whether the company is Form S-3 eligible, whether it is a repeat issuer, whether the registration statement is subject to review, and whether significant unresolved staff comments remain outstanding.

The liability and antifraud provisions of the federal securities laws apply to all registration statements, including those that go effective by operation of law pursuant to Section 8(a) of the Securities Act. The company and its representatives should ensure that the registration statement does not contain any material misstatements or omissions of material information required to be stated therein or necessary to make the statements therein not misleading.

If you choose to remove the delaying amendment described in Rule 473(a), your registration statement will not become effective until 20 days have passed. If you further amend your registration statement before it has become effective, the 20-day period will restart.

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.*” The registration statement must also be final: you must amend to include all information required by the form, including the price of the securities to be sold.

If our 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.

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If our operating status changes to operational and your registration statement is not yet effective, we may ask you to amend the registration statement to include the delaying amendment.

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 staff.

During the shutdown the SEC may issue a stop order under Section 8(d) of the Securities Act or take other emergency actions if necessary. Once the SEC resumes operations, the staff may request that you amend your registration statement even if it has become effective by operation of Section 8(a).

### 12. Can I amend to remove the delaying amendment while I have outstanding, unresolved staff comments on my filings?

As a technical matter, you may, but companies that remove their delaying amendment with outstanding staff comments should carefully consider the material issues raised by the staff and not remove their delaying amendments prior to making the necessary changes to the registration statement. You should also consider the risks and factors described in the response to Question 11 above, among others.

If you amend your filing to remove the delaying amendment and our operating status changes to operational prior to your effective date, we may ask you to amend your filing to include the delaying amendment so that we may work with you to resolve outstanding comments.

### 13. Can I file a new registration or offering statement during a shutdown?

Yes. Regardless of our operating status, EDGAR will accept registration statements, offering statements and other filings.

### 14. Can I file a new registration statement without a delaying amendment during the shutdown?

As a technical matter, you may. However, if our operating status changes during the 20-day period, we may ask you to amend the document to include a delaying amendment. You should also consider the risks and factors described in the response to Question 11 above, among others.

### 15. Will the Division consider a request for emergency relief under Rule 3-13 of Regulation S-X?

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 narrow 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 consider a request where consistent with the limitations discussed above. Submit requests to [CFEmergency@sec.gov](mailto:CFEmergency@sec.gov) and describe the emergency and the significant property interest to be protected.

### 16. Do I need to hear from the staff regarding my preliminary proxy statement or preliminary information statement before filing the definitive materials?

No. Rule 14c-5 only requires that the preliminary proxy or information statement be filed at least 10 calendar days prior to the date definitive copies are first sent or given to security holders.

The staff may review your preliminary proxy statement or preliminary information statement after our operating status changes.

### 17. Can I undertake a shelf takedown during the shutdown from an already effective shelf registration statement?

Yes. A prospectus supplement does not need to be declared effective by the staff.

### 18. Are days during which the government is shut down "business days" for purposes of rules involving day counting?

Yes. The term business day means any day other than a Saturday, Sunday, or federal holiday.

### 19. Will the Division provide a response to my Rule 14a-8 no-action request if I need to print my proxy materials during the shutdown?

No. The staff will not be able to review or respond to 14a-8 materials during a shutdown. We ask that companies and proponents work together to resolve questions to the best of their ability. It is important to note that the staff's no-action responses to Rule 14a-8(j) submissions reflect only informal staff views.

The staff will return to reviewing no-action requests when our operating status changes.

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**20. Will the Division respond to other requests for written or oral guidance on legal and interpretive questions under the federal securities laws?**

No. The staff will not be able to review or respond to other requests for written or oral guidance on legal and interpretive questions during a shutdown. This includes any written requests for no-action, interpretive, and exemptive letters relating to legal issues under the federal securities laws.

### Post-Shutdown

**21. If I removed a delaying amendment from a registration statement or filed a new registration statement without a delaying amendment and the Division's status changes to operational before the end of the 20-day period, may I request effectiveness of that registration statement on a date prior to the end of that period?**

We will consider requests to accelerate the effective date of such registration statements if they are amended to include a delaying amendment prior to the end of the 20-day period and acceleration pursuant to Rule 461 is appropriate.

**22. If I removed a delaying amendment or filed a new registration statement without a delaying amendment, do I need to add a delaying amendment when the Division's operating status changes to operational?**

In cases where we believe it would be appropriate for a registrant to amend to include a delaying amendment, we will notify that registrant.

We remind registrants that Rule 430A is only available with respect to registration statements that we declare effective and is not available to registration statements that go effective as a result of the passage of time.

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## Contacts

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### New York

**Ryan J. Dzierniejko**

Partner  
212.735.3712  
ryan.dzierniejko@skadden.com

**Gregory A. Fericola**

Partner  
212.735.2918  
gregory.fericola@skadden.com

**David J. Goldschmidt**

Partner  
212.735.3574  
david.goldschmidt@skadden.com

**Michael J. Hong**

Partner  
212.735.2227 / 416.777.4700  
michael.hong@skadden.com

**Laura A. Kaufmann Belkhatat**

Partner  
212.735.2439  
laura.kaufmann@skadden.com

**Michael J. Schwartz**

Partner  
212.735.3694  
michael.schwartz@skadden.com

**Joseph Vebman**

Partner  
212.735.3719  
yossi.vebman@skadden.com

**Dwight S. Yoo**

Partner / New York  
212.735.2573  
dwight.yoo@skadden.com

**Michael J. Zeidel**

Partner  
212.735.3259  
michael.zeidel@skadden.com

### Los Angeles

**Michelle Gasaway**

Partner  
213.687.5122  
michelle.gasaway@skadden.com

### Palo Alto

**Thomas J. Ivey**

Partner  
650.470.4522  
thomas.ivey@skadden.com

**Gregg A. Noel**

Partner  
650.470.4540  
gregg.noel@skadden.com

### Washington, D.C.

**Brian V. Breheny**

Partner  
202.371.7180  
brian.breheny@skadden.com

**Raquel Fox**

Partner  
202.371.7050  
raquel.fox@skadden.com

**Andrew J. Brady**

Of Counsel  
202.371.7513  
andrew.brady@skadden.com

**Ryan J. Adams**

Counsel  
202.371.7526  
ryan.adams@skadden.com

**Caroline S. Kim**

Counsel  
202.371.7555  
caroline.kim@skadden.com

### Frankfurt

**Stephan Hutter**

Partner  
49.69.74220.170  
stephan.hutter@skadden.com

### Hong Kong

**Shu Du**

Partner  
852.3740.4858  
shu.du@skadden.com

**Jonathan B. Stone**

Partner  
852.3740.4703  
jonathan.stone@skadden.com

### London

**James A. McDonald**

Partner  
44.20.7519.7183  
james.mcdonald@skadden.com

**Danny Tricot**

Partner  
44.20.7519.7071  
danny.tricot@skadden.com

**Pranav L. Trivedi**

Partner  
44.20.7519.7026  
pranav.trivedi@skadden.com

### São Paulo

**Filipe B. Areno**

Partner  
55.11.3708.1848  
filipe.arenos@skadden.com

**J. Mathias von Bernuth**

Partner  
55.11.3708.1840  
mathias.vonbernuth@skadden.com

### Shanghai

**Haiping Li**

Partner  
86.21.6193.8210  
haiping.li@skadden.com

**Yuting Wu**

Partner  
86.21.6193.8225  
yuting.wu@skadden.com

### Singapore

**Rajeev P. Duggal**

Partner  
65.6434.2980  
rajeev.duggal@skadden.com

### Sydney

**Adrian J. S. Deitz**

Partner  
61.4294.44311  
adrian.deitz@skadden.com

### Tokyo

**Kenji Taneda**

Partner  
81.3.3568.2640  
kenji.taneda@skadden.com

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Associate **Joshua Shainess** contributed to this client alert.