

## WSGR ALERT

APRIL 2011

# POTENTIAL RAMIFICATIONS OF A GOVERNMENT SHUTDOWN FOR THE SEC

If congressional leaders and President Obama are unable to resolve the current budget standoff, it is expected that much of the federal government would shut down as of the close of business today. The Securities and Exchange Commission (SEC) would be impacted by a shutdown and public reporting companies should expect some changes in connection with their dealings with the SEC during a government shutdown.

**We encourage all public reporting companies to monitor the SEC's website (<http://www.sec.gov>) for the latest information regarding a shutdown and the status of SEC operations.** As of early Friday, the SEC had already posted some information related to its contingency planning.

Although the SEC was able to stay open during the 1995 government shutdown, that will not occur this time. According to SEC Commissioner Mary Schapiro and the SEC's contingency plan, the SEC would keep a skeleton staff in place along with the SEC's five commissioners to monitor the markets and "work in activities that are necessary to protect life and property."<sup>1</sup> However, the bulk of the SEC's routine activities would be put on hold during a shutdown. Of specific concern to public reporting companies, a substantial majority of the SEC's staff would not have access to their offices or internal systems. As a result, the SEC would take no action involving communication with, or action by, the SEC's staff, including comment letters

relating to pending registration statements; reviews of periodic reports, proxy statements, confidential treatment requests, or no-action requests; and rulemaking activities. Additionally, SEC staffers will not be available to respond to interpretative questions. Other than for purposes of certain rule-making by self-regulatory organizations, a government shutdown would not change what constitutes a "business day" for purposes of the Securities Act, the Exchange Act, or the SEC's rules promulgated under those statutes.

The EDGAR system would remain operational, and public reporting companies should continue to file all routine reports, including Forms 8-K, 10-Q, and 10-K; Section 16 reports; and definitive proxy statements for annual meetings. Public companies would be able to file registration statements that are automatically effective upon filing (e.g., Forms S-8 and S-3ASR) and post-effective amendments or prospectus supplements related thereto or related to registration statements that are already effective. Public reporting companies should assume that SEC staffers would not be available to assist with EDGAR difficulties during a government shutdown (including matters as routine as responding to questions regarding filing fee deposits or Form ID requests, and generating new or replacement EDGAR codes)—and if staffers are available, they will be available on a more limited basis than normal.

Filings that are not automatically effective or that are subject to SEC review—such as registration statements on Forms S-1 or S-3, tender offer statements, or preliminary proxy statements—would not be processed during a government shutdown. Public reporting companies that choose to make such filings on EDGAR during a government shutdown should expect significant delays in processing even once a shutdown has ended. We note that Rule 14a-6(a) requires preliminary proxy statements to be filed at least 10 calendar days prior to the date that definitive copies are first sent or given to security holders, and public reporting companies may proceed with the dissemination of definitive materials once this period has elapsed.

Public reporting companies currently involved in an active SEC review or comment process, or that are otherwise engaged in ongoing communication with the SEC's staff, should consider contacting their examiner prior to the close of business in Washington, D.C., today to discuss the status of the SEC's review and potential options during a government shutdown.

For any questions or more information on these or any related matters, please contact your regular Wilson Sonsini Goodrich & Rosati contact or any member of the firm's corporate and securities practice.

<sup>1</sup> Jessica Holzer, "SEC to Maintain Some Functions if Shutdown Occurs," *The Wall Street Journal*, Apr. 6, 2011.

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