



SEC Operations in the Event of a Government Shutdown

On April 7, 2011, the U.S. Securities and Exchange Commission (SEC) provided guidance on its website regarding the agency's operations in the event that the U.S. federal government shuts down at 12:01 a.m. on Saturday, April 9, 2011. The guidance regarding the effects of the government shutdown is posted at http://www.sec.gov/about/2011_fed_shutdown.htm. The following discussion relates to the impact of the shutdown on issuers filing registration statements and reports that are processed by the SEC's Division of Corporation Finance.

EDGAR will remain available.

The SEC has indicated that, in the event that the federal government shuts down, the EDGAR filing system will be fully functional and accepting filings. The SEC's "lockbox" for receiving filing fee payments will remain functional as well. Given that there will be extremely limited staff working at the SEC, it is unlikely that assistance will be available with regard to EDGAR filing or fee issues. While the EDGAR filing acceptance system is fully automated, when problems arise with filings — due to the insufficiency of fees or due to some other technical filing problem — staff intervention is sometimes necessary. Issuers are therefore advised to make sure that the fees due with respect to a filing are computed properly and fully paid (and perhaps paid in excess), in order to ensure that the automated fee polling does not detect any exceptions. Issuers are also advised to conduct test filings to ensure that any other technical filing issues are resolved prior to making a live filing.

Deadlines will not be affected by a shutdown.

The shutdown of the federal government will not affect the status of whether a day is deemed to be a "business day" for purposes of the Securities Act of 1933, the Securities Exchange Act of 1934, and other SEC rules. Similarly, the shutdown of the federal government will not affect the status of any filing deadlines based on calendar days. The shutdown of the federal government would not be considered a "holiday" for the purposes of the SEC's rules. As a result, issuers should continue file all required reports under the Securities Exchange Act of 1934, including filings on Form 10-K, Form 10-Q, and Form 8-K in accordance with the deadlines prescribed by those forms and the SEC's rules. In addition, other persons with SEC filing obligations, such as Section 16 filers and beneficial owners required to file Section 13 reports, should continue to file required reports and amendments to those reports as prescribed by SEC rules.

Processing of filings will be affected by a shutdown.

In the event of a shutdown, there will be no staff available to process filings, clear comments, or confirm the absence of stop orders. Registration statements and post-effective amendments filed under the Securities Act of

1933 that become effective automatically pursuant to Rule 462 will continue to become effective. It appears that other registration statements and post-effective amendments that become effective only through action by the SEC staff will not be declared effective or accelerated, due to the unavailability of staff to process those filings. While there is no guidance from the staff on this point, it would appear to be the case that a preliminary proxy statement which is on file with the SEC for the 10-day period specified in Rule 14a-6 without any indication of staff review or staff comments could be filed in definitive form and mailed on the 11th calendar day, as no staff or SEC action is needed with regard to the definitive filing and mailing. If comments on a preliminary proxy statement that is subject to staff review cannot be resolved due to the unavailability of the staff to process the filing prior to the anticipated mailing date, issuers will have to evaluate the materiality of the issues raised in the staff comments, as well as all of the other circumstances related to the filing, prior to proceeding with the mailing of the proxy materials.

No-action and interpretive guidance will not be available during a shutdown.

In the event of a federal government shutdown, no staff members will be available to provide no-action relief or interpretive guidance. With respect to shareholder proposal no-action letters, the staff will not be available to provide no-action relief, so that an issuer with a proxy statement mailing deadline will need to consider the appropriate course with respect to the inclusion or exclusion of the shareholder proposal in the proxy statement.

Delays may be possible when the federal government re-opens.

In the event of a federal government shutdown that extends for a relatively long period of time, issuers may experience delays upon re-opening of the federal government with respect to the processing of filings and the receipt of no-action and interpretive advice.

Staff will be available for emergencies.

The SEC's announcement indicates that, in the event of a federal government shutdown, an extremely limited number of staff members will be available to respond to "emergency situations involving the safety of human life or the protection of property, including law enforcement." The SEC has established an emergency telephone hotline and email address for the Division of Corporation Finance. The telephone number is (202) 551-3100 and the email address is CFemergency@sec.gov.

Contacts

David Lynn
(202) 887-1563
dlynn@mof.com

About Morrison & Foerster

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for seven straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mof.com. © 2011 Morrison & Foerster LLP. All rights reserved.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.