



SEC, CFTC implement plans for the government shutdown

[Securities Enforcement Alert](#)

[Investment Management Alert](#)

[Financial Services Alert](#)

9 JAN 2019

By: Edward J. Johnsen | Deborah R. Meshulam | Bradley E. Phipps

As the federal government shutdown enters its third week, with uncertainty as to how long it is likely to continue, the Securities and Exchange Commission (SEC or Commission) is operating under its *Operations Plan Under a Lapse In Appropriations and Government Shutdown* (the SEC Plan) that applies to situations in which a lapse in federal government appropriations results in an SEC shutdown (referred to in the SEC Plan, and herein, as a "lapse in appropriations"). As described below, under the SEC Plan, the Commission is engaging in only limited activities. In addition, the Commodity Futures Trading Commission (CFTC) has ceased operations, except for "market-critical" functions and limited operations excepted by the federal Antideficiency Act.

Those who have business before the SEC or the CFTC should expect delays in moving forward for the duration of the government shutdown and plan accordingly. Importantly, the government shutdown does not affect the operation of the Financial Industry Regulatory Authority (FINRA), the national securities exchanges, futures and swaps markets or other self-regulatory organizations (SROs) or exchanges.

THE SEC PLAN

The SEC Plan is designed to comply with the requirements of the federal Antideficiency Act, which strictly limits the conduct of business by federal agencies in the event of a lapse in appropriations—*ie*, a government shutdown. The SEC Plan applies to all SEC personnel with pay and non-pay status, except for Presidential/Senate confirmation appointees and those employees whose positions are funded through a permanent or multi-year appropriation in effect at the time of the lapse in appropriations.

Beginning on Thursday, December 27, 2018 and continuing until further notice, the SEC has had only a limited number of staff members actively engaged in Commission business. While there are staff members available to respond to emergency situations involving market integrity and investor protection, including law enforcement, and the SEC continues to operate certain systems such as the Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system, most activities are currently suspended.

Some of the most important aspects of the SEC Plan are highlighted below.

MAJOR DISCONTINUED FUNCTIONS

Major SEC functions that are currently discontinued include:

Law enforcement/litigation: Ongoing litigation, except matters that cannot be deferred; investigative work, including commencing investigations and taking testimony, except as necessary for the protection of property; collection of delinquent debts and distribution of funds to harmed investors; and non-emergency examinations and inspections and related follow-up.

Filings and registrations: Review and approval of registration applications by investment advisers, broker-dealers, transfer agents, municipal advisors and other entities, and with respect to new financial products; review and approval of SRO rule changes; review of registration statements for securities offerings and accelerations of effectiveness; review of periodic reports and other filings; and non-emergency registrant support.

Rulemaking/interpretive questions/exemptive relief: All non-emergency rulemaking, interpretive advice, no-action letters and processing of applications for exemptive relief.

SROs and the Public Company Accounting Oversight Board: All routine oversight matters.

International matters: Non-emergency assistance to foreign authorities under bilateral or multilateral arrangements; participation in multilateral organizations and working groups.

Other functions: Processing of Freedom of Information Act (FOIA) requests (absent compelling need); Equal Employment Opportunity Office functions; investor outreach and education; monitoring investor toll-free telephone lines and emails; routine human resources functions; non-emergency travel; routine public communications; and operation of the Public Reference Room.

MAJOR FUNCTIONS THAT WILL CONTINUE DURING A LAPSE IN APPROPRIATIONS

During the shutdown, the SEC will have limited staff available to respond to emergency situations involving safety of human life or protection of property, including law enforcement matters. Certain functions will continue because they are authorized by law. Personnel engaged in these activities may work even in the absence of an appropriation. Contracts that have a continued source of funding with appropriated, multi-year or no-year funds may continue. Stop-work orders may be issued based on business assessments of the need and required support. Privatized functions or systems will continue; other functions generally will be discontinued.

Certain systems will operate under modified conditions, including:

EDGAR and filer support: The EDGAR system is operated pursuant to a contract and will remain fully functional as long as funding for the contractor remains available. SEC personnel will process requests for access codes and password resets and will answer questions about fee-bearing filings and other emergency questions regarding EDGAR submissions.

However, the Divisions of Corporation Finance, Investment Management and Trading and Markets, and the Office of Compliance Inspections and Examinations (OCIE), will not process filings, provide interpretive advice, issue no-action letters or conduct any other normal activities. New and pending registration statements and applications for exemptive relief will not be processed regardless of the status of any review at the start of the lapse in appropriations.

IARD: The Investment Adviser Registration Depository (IARD) system operates pursuant to a contract and will remain fully functional and continue to accept filings as long as funding remains available. However, OCIE will not be able to approve applications for registration by investment advisers and the Division of Investment Management will be unable to provide interpretive advice regarding the Advisers Act, rules, or forms, or consider applications for exemptive relief. New and pending investment adviser registration applications will not be processed; however, IARD will continue to accept annual and other amendments to Forms ADV, ADV-W and ADV-E filings.

CRD and Transfer Agent Registration System: The Central Registration Depository (CRD) will continue to function and accept filings, as will the Transfer Agent Registration System; however, the Division of Trading and Markets and OCIE will not review pending filings, consider new or pending applications or registrations, provide interpretive advice, issue no-action letters, or conduct other normal activities.

EFFS: The Electronic Form 19b-4 Filing System (EFFS) will continue to accept SRO proposed rule changes. Because SEC Rule 19b-4 provides that any day on which the SEC is not open for regular business as a result of a lapse in appropriations is not a "business day" for these purposes, the filing date of any proposed rule change submitted during the lapse in appropriations will be the next business day after the end of the lapse in appropriations.

Enforcement/litigation: Limited staff will handle emergency enforcement matters including temporary restraining orders and other steps necessary for protecting public and private property; monitor the SEC Tips, Complaints and Referrals and web-based investor complaint systems; process SRO and other referrals to identify emergencies and follow up as appropriate; deal with ongoing litigation that cannot be deferred; and conduct emergency examinations and inspections to protect public and private property.

Monitoring and surveillance of the market: The SEC will engage in Market Watch activities and will monitor market technology operations, broker-dealers reported to be in financial distress, money market funds and relevant international market developments.

Tips, complaints and referrals: The Enforcement Division will have limited staff to perform critical functions, and will attempt to respond to critical matters including allegations of ongoing fraud and misconduct. The Tips, Complaints, and Referrals website will continue to operate and submissions will be reviewed for appropriate action.

Investor complaints: The Office of Investor Education and Advocacy will have limited staff available to review investor complaints but will not be able to respond to complaints, questions or requests for information.

Comment letters and public input: The SEC will continue to accept comment letters, but there will be delays in posting them to the SEC website.

Public reference room: The SEC's public reference room will be closed during the lapse in appropriations. Absent a compelling need, FOIA requests will not be processed.

Mail delivery: Limited staff will be on duty to process incoming mail. The SEC's mail room will be open from 8 a.m. to 5:30 p.m., Monday through Friday, to accept mail and packages from couriers; however, there will be delays in processing and delivery to SEC staff. For emergency deliveries, contact the staff using the telephone numbers and/or e-mail addresses below.

Other functions: SEC staff will perform functions related to shutting down operations; post-lapse communications; ongoing human resource and administrative support for excepted personnel; operation of SEC network and information systems, including cybersecurity protections; and securing SEC facilities to protect human life and prevent loss of property.

The Office of the Ethics Counsel will continue to perform functions necessary for the protection of property; the Office of Financial Management will process essential obligations; and the Office of the Secretary will perform functions related to SEC meetings regarding emergencies.

The Office of the Inspector General will perform limited administrative tasks; provide assistance to support excepted functions; and, as necessary, address emergency situations involving threats to the safety of human life or protection of property.

EMPLOYEES SUBJECT TO FURLOUGH AND EXCEPTED EMPLOYEES

SEC employees other than excepted employees – including student volunteers, unpaid consultants and individuals on Intergovernmental Personnel Act agreements – are subject to furlough. Employees not designated as excepted employees are not allowed to work voluntarily without pay (performing voluntary services violates the Antideficiency Act and is not permitted under any circumstances).

"Excepted employees" are employees excepted from furlough because they perform work that, by law, may continue during the lapse in appropriations; this includes those performing emergency work involving safety of human life or protection of property, and those performing certain other functions. Under the SEC Plan, the SEC established a Contingency Planning Committee (CPC) to act on the Chairman's behalf. In consultation with the SEC's Office of General Counsel, the CPC determined which employees' duties relate to functions excepted from the Antideficiency Act, and will reassess matters periodically and amend the list of excepted employees as needed.

NOTIFICATION TO THE PUBLIC AND STAFF

As appropriate, the Office of Public Affairs will inform the public and SEC employees of the SEC's operating status and emergency functions through the SEC website and other channels. Main phone lines will contain messages regarding the current status of SEC

operations.

RESUMPTION OF NORMAL ACTIVITIES

Once the shutdown ends, SEC employees will report back to work on their next scheduled workday. Critical IT personnel may be required to report to work earlier than normal to ensure that systems are operational as soon as possible (provided funding actually is available). The Office of Financial Management staff will ensure that all financial transactions that occurred during the lapse in appropriations are processed and recorded.

EMERGENCY CONTACTS

The SEC has provided a special contact list for emergency situations.

Division of Corporation Finance
CFemergency@sec.gov
(202) 551-3100

Division of Investment Management
IMemergency@sec.gov
(202) 551-6720

Division of Trading and Markets
TMemergency@sec.gov
(202) 551-5500

Division of Enforcement
ENFemergency@sec.gov
(202) 551-4800

Division of Economic and Risk Analysis
RFemergency@sec.gov
(202) 551-6654

Office of Compliance Inspections and Examinations
OCIEemergency@sec.gov
(202) 551-6200

Office of the Secretary
OSEmergency@sec.gov
(202) 551-5400

Office of International Affairs
OIAEmergency@sec.gov
(202) 551-6690

Office of Municipal Securities
Munis@sec.gov
202-551-5680

Office of Public Affairs
news@sec.gov

Office of the Chief Accountant
OCA@sec.gov
(202) 551-5300

The SEC Plan will remain in operation until the conclusion of the lapse in appropriations. The SEC will post any additional changes on its website as they occur. Additional information also may be available on the web pages of the various SEC divisions and offices.

CFTC OPERATIONS DURING THE SHUTDOWN

The CFTC is also required to cease operations not excepted by the Antideficiency Act. While the CFTC has not published a detailed plan of operations, on December 21, 2018, CFTC Commissioner Giancarlo issued a statement on the status of CFTC operations in the event of a lapse of appropriations. According to the statement, a small team of CFTC employees is continuing to perform "market-critical" functions and other excepted functions under the Antideficiency Act, including monitoring futures and swaps markets, essential enforcement activities and analyzing activity in the futures and swaps markets for any impact on the clearing system.

If you would like to learn more about the SEC Plan or the status of CFTC operations and what it may mean for your business, please contact one of the authors or your usual DLA Piper contact.

AUTHORS



Edward J. Johnsen



Partner
New York | T: +1 212 335 4500
edward.johnsen@dlapiper.com



Deborah R. Meshulam
Partner
Washington, DC | T: +1 202 799 4000
deborah.meshulam@dlapiper.com



Bradley E. Phipps
Associate
Philadelphia | T: +1 215 656 3300
bradley.phipps@dlapiper.com
