January 10, 2019

Update on the Federal Government Shutdown

As the federal government shutdown is poised to enter a fourth week, its impact on companies and their corporate operations grows. To help our clients and other interested parties navigate these developments, below is an update on operational status at selected federal agencies. Many are able to maintain some operations because their particular budget allocations so permit; however, this may change as the shutdown continues. Expect delays in actions at many agencies even after they open due to the developing backlog.

Securities and Exchange Commission

Until further notice, the Securities and Exchange Commission (SEC) is operating with very limited staff and will generally respond only to emergency situations involving market integrity and investor protection issues. EDGAR, however, remains open to accept filings. The Division of Corporation Finance has some staff to answer filing fee questions via email (CFEmergency@sec.gov), but will not respond to other queries or continue other operations. As a result, Corporation Finance will be unable, for example, to review or declare effective registration statements, qualify Form 1-A offering statements, process no-action letter requests or give other interpretative advice. It is expected that registration statements or other filings that are in essence self-executing nonetheless may be used. For example:

- WKSI issuers will continue to be able to make securities offerings as their registration statements are automatically effective upon filing.

- MJDS issuers will continue to be able to make securities offerings with registration statements that become automatically effective by rule without any order of the SEC.

- Companies may publish and mail their definitive proxy statements 10 days after the filing of a preliminary proxy statement (if any) during the shutdown as the staff is not expected to conduct any substantive review of such materials.

- Issuers that have already filed a registration statement may file an amendment to remove the delaying amendment and to add all information required by the related form, including pricing information (since Rule 430A is not available in the absence of a delaying amendment). The registration statement would then become effective in 20 days.

- Issuers that need to update their prospectuses in a post-effective amendment should not continue with their offerings because the staff will not be able to declare the amendment effective.

For more information, see Corporation Finance's FAQs related to the shutdown.

The Office of Compliance Inspections and Examinations will be unable to approve applications for registration by investment advisers (Form ADV), 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 under the Advisers Act. As a result, new or pending investment adviser applications will not be processed. The IARD system will continue to accept annual and other-than annual amendments to Form ADV, Form ADV-W and Form ADV-E filings.

Finally, due to limited staffing in the Enforcement Division, most (but not all) of the staff's work on ongoing litigations and investigations has been suspended. With respect to investigations, the exceptions seem to be for cases involving particular time constraints, including expiring statutes of limitations. Court filings reflect that many members of the Enforcement Division have been or will soon be furloughed, and in certain pending litigations the Enforcement Division has sought and received stays from courts based on the lapses in funding, including the unavailability of Enforcement lawyers and the inability to fund litigation-related expenses. Detail on Enforcement/Litigation during the shutdown can be found on p. 15 of the SEC shutdown plan linked below.

Changes to this status will be posted on the SEC's website landing page at https://www.sec.gov/. For more information, see the SEC's Operations Plan under a Lapse in Appropriations and Government Shutdown (December 2018).

Antitrust Merger Review at the Department of Justice and the Federal Trade Commission

Competition reviews of proposed mergers and acquisitions under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act are ongoing at both the Department of Justice, Antitrust Division (DOJATR) and the Federal Trade Commission (FTC). However, there is a much more limited staff at the agencies performing the work, and certain of the agencies' policies and procedures are impacted relative to the norm.

The Premerger Notification Office (PNO) of the FTC remains open to receive and review HSR filings; however, emails or telephone inquiries regarding HSR rules or filing procedures are not being answered. During the "shutdown," the FTC will continue to preserve its jurisdiction to investigate proposed transactions of potential interest to them and, in certain very limited situations, actually continue working on merger investigations if they deem it is necessary to do so to protect competition. For more information, see Status of FTC Online Services during 2018 Lapse in Funding.

The DOJATR also remains open to receive and review HSR filings, and will continue to "prepare cases that must be filed due to Hart-Scott-Rodino or statute of limitations deadlines, only when an extension or waiver cannot be obtained and [DOJATR] leadership determines that allowing a proposed merger to go forward without objection would pose a reasonable likelihood of peril to property in which the United States has an immediate interest." For more information, see the Dept. of Justice, FY 2019 Contingency Plan.

Finally, no early terminations of HSR waiting periods will be granted, so parties should expect to observe the full waiting period of 30 calendar days in most cases. Waiting periods will continue to run and will expire as scheduled if DOJATR and FTC do not issue a request for additional information (*i.e.*, a Second Request), which may occur if the staff determines it necessary. While difficult to predict, there may be delays in review of certain strategic transactions (including increased risk of a "pull and refile" scenario, or a higher likelihood of a Second Request being issued).

Committee on Foreign Investment in the U.S. (CFIUS) Review

On December 22, 2018, CFIUS practitioners were notified by e-mail from the Treasury Department that all deadlines for declarations and transactions under review or investigation are tolled pursuant to the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). As a consequence of the shutdown, no new cases are being accepted by CFIUS, and, once CFIUS resumes normal business operations, all deadlines for existing cases will be extended by the number of days of the shutdown. Given that CFIUS was already struggling with the existing workload prior to the shutdown, an extended shutdown is likely to cause a very difficult adjustment period when CFIUS resumes normal business operations, in terms of both case management and regulatory initiatives under FIRRMA.

Internal Revenue Service

The Internal Revenue Service (IRS) has confirmed that it will be recalling a significant portion of its workforce and begin processing tax returns starting January 28, 2019. An updated shut-down contingency plan is expected to be released in the coming days. As of now, many of the departments we work with on transactional issues are closed, making it impossible to proceed with other matters, such as seeking IRS guidance and private letter rulings. Also, for example, obtaining an EIN for a foreign entity (which requires speaking to the IRS) is currently not possible, which means, among other things, that check the box elections for these entities may be delayed or have to be filed late. Also, certain tax regulations are still in the proposal stage, and the shutdown may delay their finalization. While tax payers are permitted to rely on certain proposed regulations, some are delaying action pending release of the final regulations.

For more detail, see the IRS news room and the existing IRS Fiscal Year 2019 Lapsed Appropriations Contingency Plan.

Federal Communications Commission

With few exceptions, the Federal Communications Commission (FCC) has suspended all electronic filing and application processing services including: (1) processing of applications for broadcast, wireless, wireline and other licensing services, (2) processing of applications requesting FCC consent to mergers and acquisitions of companies that hold or control broadcast, wireless wireline and other FCC licenses and authorizations, (3) consumer protection and local competition enforcement, (4) equipment authorizations, (5) rulemaking activities, (6) radio spectrum management and (7) action on consumer complaints. The FCC will, however, keep its filing window and mail operations open to receive filings related to authorized spectrum auction activities. The agency will also accept and act on all filings that are necessary for the protection of life and property.

Filing deadlines for comments relating to FCC rulemaking proceedings, responsive pleadings relating to license and merger applications, special temporary authorizations (STAs) that are due to expire during the suspension of FCC operations and other documents due to be filed with the FCC during the shutdown will be extended until the second business day after the FCC resumes normal operations. However, the FCC will not extend deadlines for the payment of regulatory and application fees, civil monetary penalties, installment payments and other debts that are due during the shutdown. Such payments must be submitted on a timely basis through US Bank.

Although the FCC's online filing functions have been suspended, many of the FCC's online database systems will remain accessible to the public for research related purposes but will not be updated during the shutdown.

For further information, please refer to the FCC's Public Notice on the Impact of Potential Lapse in Funding on Commission Operations. The FCC will also post updates to its website (www.fcc.gov) as needed.

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