



Defining Issues[®]

SEC Rule 3-13 waiver requests during the government shutdown

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KPMG highlights the SEC's Q&A on requests for emergency relief under Rule 3-13 during the government shutdown.

Applicability

Public companies including domestic and foreign private issuers.

Facts and impacts

On December 27, 2018 the SEC closed, except for limited essential personnel, as a result of the partial US federal government shutdown.

Waiver requests under Rule 3-13¹ of Regulation S-X will only be considered by the staff of the SEC's Division of Corporation Finance (Corp Fin) in emergency situations. Specifically, under the Antideficiency Act² (the Act) federal agencies are prohibited from providing ongoing, regular functions except for emergencies involving the protection of property.³

Emergency waiver requests

Corp Fin issued Questions and Answers⁴ (Q&As) to help companies and their advisers with certain filing matters during the government shutdown. The Q&As include a question on emergency Rule 3-13 waiver requests, Question 9.

Companies that have an open Rule 3-13 waiver request or plan to submit a waiver request during

the government shutdown are advised to evaluate their facts and circumstances first to determine if there is an emergency that involves the protection of property within the context of the Act.

While the Act does not explicitly define property, it references property that the government:

- owns;
- has some responsibility for; or
- has an immediate interest in or some duty to perform.

As this requires legal interpretation, a company's legal counsel should be involved in the evaluation to determine whether an emergency exists and whether a waiver request under the Act should be submitted.

If a company and its legal counsel conclude it is appropriate to submit an emergency waiver request, the request should include the following information, which should reflect a detailed consideration of the Act:

- a description of the emergency; and

¹ [Rule 3-13](#), Filing of other financial statements in certain cases, allows the SEC staff to modify or waive financial statement requirements of the federal securities laws.

² [Principles of Federal Appropriations Law](#): Third Edition, Volume II, Chapter 6, Availability of Appropriations: Amount; Section C, Antideficiency Act. Published by the United States General Accounting Office. February 1, 2006.

³ 31 U.S. Code [Section 1342](#), Limitation on voluntary services

⁴ [Division of Corporation Finance actions during government shutdown](#)

- the significant property interest to be protected.

Emergency requests should be submitted to CFEmergency@sec.gov with the subject line “Emergency relief under Rule 3-13 of Regulation S-X.”

Because only essential personnel are working, Corp Fin may consider only requests that demonstrate an imminent threat to the protection of property under the Act. Similar to Rule 3-13 requests during normal operations, not all requests will be granted.

KPMG observations

The ongoing, regular duties of Corp Fin focus on ensuring that investors have material information so they can make informed investment decisions. Corp Fin also provides interpretive assistance to companies about SEC rules and regulations.

In our view, when considering the duties of Corp Fin, the Act sets a very high hurdle for companies to demonstrate that an

imminent threat to property exists that would qualify as an emergency.

We anticipate only extreme or unusual circumstances will ultimately be considered by Corp Fin during the shutdown. For example, we would not expect a company’s capital raising activity to be an emergency because alternative funding sources exist - e.g. debt or private funding.

Additional Corp Fin Q&As

Corp Fin’s Q&As address additional matters relating to registration statements, offering statements and other questions about filings and other federal securities laws. The Q&As offer answers about transactions affected by the shutdown including:

- updating information prior to commencing an offering;

- pricing an offering within the 15-day rule for an effective registration statement;
- removing the delaying amendment language; and
- filing a new registration or offering statement.

We expect these Q&As to be updated as the shutdown continues.

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KPMG’s Financial Reporting View

kpmg.com/us/frv

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