

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HISTORY ASSOCIATES INCORPORATED,

Plaintiff,

v.

U.S. SECURITIES AND EXCHANGE
COMMISSION,

Defendant.

Case No. 1:24-cv-1858-ACR

HISTORY ASSOCIATES' OPPOSITION TO THE SEC'S MOTION TO STAY

History Associates opposes the SEC's motion to stay the October 8 status conference. The ongoing risk of irreversible loss of records creates unmistakable urgency. History Associates sought this hearing to address a recent report from the SEC's Office of Inspector General detailing how (1) the SEC destroyed nearly a year's worth of then-Chair Gensler's text messages and routinely failed to discharge its FOIA obligations and (2) additional text messages of other top SEC officials remain at risk of imminent destruction. ECF 37. The SEC claims that an indefinite stay of the hearing is warranted because the government shutdown prohibits agency staff from continuing to work on the matter under the Anti-Deficiency Act. But that is wrong. As federal agency guidance acknowledges, the Anti-Deficiency Act permits agencies to comply with court orders and to attend scheduled hearings—and agencies routinely do so during government shutdowns. And the Act independently permits government employees to work to prevent the destruction of property, such as the text messages at issue here. The SEC should be required to answer for its conduct on October 8 as planned.

I. This Court’s Prompt Intervention Is Needed To Prevent Additional Data Destruction

The October 8 status conference in this case was scheduled because History Associates requested this Court’s prompt intervention to address troubling findings of document destruction and FOIA violations in a recent report by the SEC’s Office of Inspector General. *See* ECF 37 at 4-8. The OIG Report explained that the SEC has been “unable to successfully back up the mobile devices used by about 40 other [SEC] officials,” and that “[a]s a result, the text messages stored on these SEC devices are at greater risk of loss or may have already been lost.” *Special Review: Avoidable Errors Led to the Loss of Former SEC Chair Gary Gensler’s Text Messages* 7 (Sept. 3, 2025), <https://www.sec.gov/files/sec-oig-review-587-2025.pdf>. A prompt hearing remains urgently needed to minimize the risk that additional responsive text messages will be destroyed.

II. The Government Shutdown Is No Reason To Stay The October 8 Hearing

The SEC’s only argument for delay is that the government shutdown prohibits agency staff from continuing to work on this matter under the Anti-Deficiency Act. ECF 40. But the SEC is wrong. The Anti-Deficiency Act permits the government to continue activities that are “authorized by law,” as well as to respond to “emergencies involving ... the protection of property.” 31 U.S.C. § 1342. Both of those independent conditions warranting the continuation of agency operations are satisfied here.

First, the SEC’s work preparing for and attending the October 8 hearing is “authorized by law,” 31 U.S.C. § 1342, because federal employees can continue to work during a shutdown to comply with court orders. As the Department of Justice has explained, when a court “order[s] a case to continue, the Government will comply with the court’s order, which would constitute express legal authorization for the activity to continue.” *U.S. Department of Justice FY 2026 Contingency Plan* (Sept. 29, 2025), <https://tinyurl.com/y8846n49>. And here, this Court “ORDER[ED]

the parties to appear for a status conference” (Sept. 18, 2025 Minute Order) that was “set for 10/8/2025” (Sept. 30, 2025 Minute Order). So if the “court denies the [SEC’s] request and adheres to its existing schedule, ‘the Government will comply with the court’s order, which would constitute express legal authorization for the activity to continue.’” *Kornitzky Grp., LLC v. Elwell*, 912 F.3d 637, 638 (D.C. Cir. 2019) (Srinivasan, J., concurring) (collecting cases).

Courts regularly deny requests for stays during government shutdowns. *See, e.g., Elwell*, 912 F.3d at 638 (denying motion for “stay of oral argument due to lapse in appropriations”); Order, *Leader Commc’ns, Inc. v. FAA*, No. 18-1147 (D.C. Cir. Jan. 7, 2019) (denying motion to stay briefing); Order, *Figueroa v. Pompeo*, No. 18-5064 (D.C. Cir. Jan. 3, 2019) (denying motion to stay oral argument). Indeed, “when federal appropriations lapsed in 2013,” the D.C. Circuit “received Government motions to stay oral argument in at least sixteen cases. Every one of these motions was denied; and every time, the Government then participated in oral argument.” *Elwell*, 912 F.3d at 638 (Srinivasan, J., concurring) (collecting cases). The same should occur here.

Second, the SEC’s work preparing for and attending the October 8 hearing falls within the Anti-Deficiency Act’s “protection of property” exception. 31 U.S.C. § 1342. The Department of Justice has explained that the Anti-Deficiency Act does not prohibit government operations during a shutdown when there is “a reasonable likelihood that ... the protection of property would be compromised, in some significant degree, by delay in the performance of the function in question.” *DOJ FY 2026 Contingency Plan, supra*. In line with the Department’s guidance, the SEC maintains staff during a government shutdown to “[h]andle ongoing litigation that cannot be deferred because there is a threat to property.” *SEC’s Operations Plan Under a Lapse in Appropriations and Government Shutdown* (Aug. 7, 2025), <https://tinyurl.com/2zfvztxe>.

Here, there is at least a reasonable likelihood that delaying the October 8 hearing would endanger the protection of property—namely, the text messages of top SEC officials that remain at risk of deletion according to the agency’s own OIG. That agency property will remain at risk of destruction every day until this Court orders the agency to search for and preserve those records. This Court should keep the October 8 hearing on the calendar to ensure that all available measures are taken by the SEC to preserve and produce responsive records.

Date: October 1, 2025

Respectfully submitted,

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