

Tick Tick Tick: How the Potential Government Shutdown Will Impact US HSR Filings and Merger Enforcement

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If the US government fails to enact appropriations to fund federal operations by September 30, 2023, the resulting government shutdown would have far-reaching implications for over 400 federal agencies, including those tasked with merger enforcement: the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”). Both the FTC and DOJ have issued contingency plans for a potential shutdown (see [here](#) and [here](#)). The implications are summarized below.

Key Takeaways

1. The FTC has stated that it will have funding to continue largely normal operations for approximately three weeks (until October 20).¹
2. In the event of a prolonged shutdown:
 - a. Hart-Scott-Rodino (“HSR”) filings will continue to be accepted by the agencies (via electronic filing).
 - b. The FTC Premerger Notification Office (“PNO”) will continue to operate, but may have reduced hours, staff, or days of operation. The PNO will not respond to questions or requests for information or advice from outside parties.
 - c. Second Requests will continue to be issued.
 - d. Up to approximately 50% of personnel at the FTC’s Bureau of Competition and 40% of personnel at the DOJ Antitrust Division may be furloughed. This would likely slow the pace of merger investigations.

¹ <https://news.bloomberglaw.com/antitrust/facing-shutdown-ftc-has-three-weeks-funding-to-keep-operating>.

- e. In litigated matters, the agencies may seek extensions of any trial dates, hearings or filing deadlines. If relief is not granted, however, the agencies will continue to litigate matters as scheduled.
- f. The FTC will extend the deadline of any Civil Investigative Demand. The DOJ may take a similar approach but has not stated so publicly.

Potential Impact on Duration of Merger Investigations

While HSR filings can continue to be submitted during a shutdown, the agencies' limited staffing may impact their ability to analyze these filings quickly. That, in turn, could result in delays and more extended merger reviews. For example, during the December 2018 – January 2019 shutdown, which lasted 35 days, the FTC stopped work on investigations of mergers where there was no imminent deadline.

This potential shutdown may similarly delay the review of mergers. The agencies may request that merging parties refile their HSR forms, for example, thereby starting a new 30-day waiting period. In limited circumstances, the agencies may also issue broad Second Requests to prevent waiting periods from expiring before the agencies have completed their investigations.

Impact on Proposed Policy Changes

The potential shutdown comes on the heels of major proposed changes to both the [HSR form](#) and the [US merger guidelines](#). The agencies are currently receiving and reviewing public comments in connection with these proposed changes. The shutdown and associated staffing shortages could further delay progress on these initiatives.

We will continue to monitor any developments in the event of a shutdown.

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