

# Impact of Government Shutdown on US Antitrust Merger Enforcement and CFIUS Review

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On December 21, 2018, the federal government failed to enact appropriations to fund certain federal operations, resulting in a partial government shutdown. Both the Department of Justice (DOJ) and Federal Trade Commission (FTC) have issued plans for how a shutdown will impact antitrust merger enforcement. Similarly, the Department of the Treasury (Treasury) provided guidance regarding the impact of a government shutdown on CFIUS review.

## Key Takeaways

### US Merger Enforcement

- Hart-Scott-Rodino (HSR) filings will be accepted by the agencies during the government shutdown.
- Early Termination of the HSR waiting period will not be granted during the shutdown.
- Due to its limited staff, the Premerger Notification Office of the FTC will not answer email or telephone inquiries regarding HSR rules or filing procedures.
- HSR waiting periods will continue to run during a government shutdown and DOJ and FTC staff will continue to review premerger filings and conduct investigations to determine whether to challenge reported transactions under the antitrust laws.
- Second Requests will continue to be issued.
- If engaged in merger litigation, FTC and DOJ attorneys will notify opposing parties and the courts of the government shutdown and attempt to negotiate timing extensions and suspensions. If such relief is not available, they will continue to litigate the matter.
- The FTC and DOJ websites will be available during a shutdown but will not be regularly updated.
- Additional guidance may be published by the FTC or DOJ after the shutdown goes into effect.

### CFIUS

- CFIUS activities will be suspended, except for “caretaker functions” related to cases the review or investigation of which was initiated prior to the enactment of FIRRMA.

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- The deadlines for all other cases (including notices and declarations) are “tolled” during the lapse. CFIUS filings can be submitted during the government shutdown, but will not be commented upon or accepted for review.
  - For extended shutdowns, longer-than-usual delays in providing comments on drafts or accepting formal filings are likely to occur after the government reopens.

## Analysis

The DOJ, FTC and Treasury have developed shutdown plans in the event of a government shutdown. Each plan designates which employees are furloughed during a shutdown and which employees are excepted from the furlough requirement.

### US Merger Enforcement

The DOJ and the FTC both issue contingency plans indicating that certain employees connected to antitrust enforcement within the Antitrust Division of the DOJ and the Bureau of Competition at the FTC will be excepted from the furlough and will continue to conduct antitrust enforcement activities.

During the government shutdown, the FTC and DOJ will accept HSR filings and certain staff from the Commission’s Premerger Notification Office will be excepted from furlough to accept filings and organize them for review; however, they will not issue early terminations of the HSR waiting period. HSR waiting periods will run their normal course during the shutdown, and both agencies will keep sufficient staff on hand to investigate mergers that could raise competitive issues. For litigated matters, both agencies have indicated that when possible, they will attempt to secure a continuance or otherwise request suspensions of dates for trials, hearings and filings, or similar relief to preserve the government’s claim. If such relief is not available, both agencies will commence litigation or continue to litigate the matter.

In the current DOJ Contingency Plan, of the 655 Antitrust Division employees, a total of 264 (40%) are excepted from furlough in the case of a government shutdown. In the current FTC Contingency Plan, of the 306 total Bureau of Competition employees, a total of 132 (43%) are excepted from the furlough. Moreover, within the Bureau of Economics, of the 105 employees, 10 (9%) are excepted from the furlough.

It is difficult to anticipate whether the FTC or DOJ would be more likely to request that merging parties refile their HSR forms (starting a new waiting period), or whether they would be more likely to issue a Second Request because of more limited staffing. It will likely depend on how long a shutdown lasts and how substantial the merger review workload is during a shutdown.

### CFIUS Review

A lapse in appropriations would mean that most of the CFIUS staff at Treasury, which chairs CFIUS, would be forbidden from engaging in any work, including reviewing draft filings or commencing any new reviews. If the shutdown is prolonged (as it was in 2013), this could cause a backlog in draft and formal filings, and – once the shutdown ends – longer-than-usual delays in providing comments on drafts or accepting formal filings.

The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) now specifies that, for cases that are formally under assessment, review or investigation by CFIUS at the time that appropriations lapse, any deadlines “toll” during the lapse. So if, for example, the shutdown lasts 10 days, an extra 10 days is added to any “Day 30” of a declaration or “Day 45” of review or investigation. Prior to FIRRMA, the “CFIUS clock” continued to tick during shutdowns, even though most CFIUS staff could not perform their work. This forced some cases that could otherwise have cleared in “review” to roll over into the subsequent “investigation” phase; and cases in “investigation” that lost too much time needed to be withdrawn and refiled.

Links to the current DOJ, FTC and Treasury Contingency Plans can be found here:

- DOJ – <https://www.justice.gov/jmd/page/file/1015676/download>
- FTC – [https://www.ftc.gov/system/files/attachments/office-executive-director/ftc\\_shutdown\\_plan\\_08-15-17.pdf](https://www.ftc.gov/system/files/attachments/office-executive-director/ftc_shutdown_plan_08-15-17.pdf)
- Treasury – <https://home.treasury.gov/system/files/266/DO-Lapse-Contingency-Plan-2018-12-18.pdf>

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