

# Government shutdown affects antitrust and CFIUS reviews of transactions

2 January 2019

After Congress failed to enact appropriations legislation, the United States federal government partially shut down beginning at midnight on 22 December 2018, impacting several departments, agencies, and interagency committees, including the Bureau of Competition at the Federal Trade Commission (FTC), the Antitrust Division of the Department of Justice (DOJ), and the Committee on Foreign Investment in the United States (CFIUS), which is chaired by the Department of the Treasury (Treasury). The [FTC](#) and [DOJ](#) had previously released contingency plans detailing the impact of a shutdown on the agencies' operations, including their review of mergers and acquisitions. Similarly, [Treasury](#) had previously released lapse in appropriations contingency plans, including a Treasury departmental offices plan that outlines the limited CFIUS operations that will continue during a shutdown.

## Key takeaways for antitrust review

- **The agencies will continue to accept HSR filings:** Limited staff will be maintained to accept and process new filings submitted under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR).
- **Early termination will not be granted during the shutdown, but waiting periods will continue to run:** Parties submitting filings to the agencies will not receive early termination during the shut down and should plan for the full waiting period (generally 30 calendar days) in determining closing dates. Limited staff at the agencies could also extend waiting periods where they think circumstances warrant further investigation.
- **The FTC will not respond to HSR-related inquiries, but existing guidance will remain available:** FTC staff typically answers questions and provides informal interpretations of HSR rules and regulations in response to email inquiries by parties analyzing whether HSR filings are required or preparing filings, but such guidance will not be available during the shutdown. Existing guidance, along with other agency information, will remain available on the FTC's website.
- **The agencies will continue to investigate and litigate transactions:** Transactions with possible antitrust substantive issues will still likely receive scrutiny by the agencies, and the shutdown is unlikely to decrease the likelihood of a Second Request or challenge if the agencies believe circumstances warrant such action. If anything, some parties who file during the shutdown may be more likely to get a Second Request than they would have been in the

absence of the shutdown since they will not have the full 30 days to provide information to address an agency's initial questions. In such cases, a pull and refile of the HSR form by the acquiring person, giving the agencies a second initial waiting period in which to examine the transaction, may make sense.

In the FTC contingency plan, the FTC concedes that, although the agencies can technically challenge a merger outside of the initial generally 30-day statutory review period, "the nature of the available relief changes dramatically once a merger or acquisition is consummated." As a result, the FTC intends to initiate or continue investigations where it believes that "a failure...to challenge the transaction before it is consummated will result in a substantial impairment of the government's ability to secure relief at a later time." For matters currently in litigation, the FTC will "request suspensions of dates for trials, hearings and filings, or similar relief to preserve the government's claim" and will maintain limited staff to litigate matters where it cannot obtain deadline extensions. However, all nonmerger investigations currently underway at the FTC will be suspended during the shutdown.

According to the DOJ contingency plan, the DOJ will similarly limit staffing to those employees necessary to launch or continue merger investigations or litigation where it cannot obtain a continuance or extension of a statutory deadline and where DOJ "leadership determines that allowing a proposed merger to go forward without objection would pose a reasonable likelihood of peril to [the government's interests]." The DOJ will also continue ongoing criminal trials and prepare for criminal proceedings already scheduled, and pursue nonmerger civil litigation.

### Key takeaways for CFIUS review

- **During the government shutdown, CFIUS activities will be suspended except for certain "caretaker functions," according to Treasury's lapse of appropriations plan:** The "caretaker functions" are those related to (i) cases the review or investigation of which began prior to enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) and (ii) CFIUS-related national security exigencies. Thus, CFIUS has suspended its review of all post-FIRRMA declarations and joint voluntary notices and will not review any declarations or notices submitted during the shutdown or acknowledge receipt of such filings.
- **During the shutdown, all CFIUS-related deadlines will be suspended:** The Treasury contingency plan states that "all [post-FIRRMA] cases (including notices and declarations) will be tolled," and CFIUS has notified all parties to pending CFIUS declarations and notices that "all deadlines for declarations and transactions under review or investigation are tolled [as of midnight on 22 December 2018]." In practice, any CFIUS review or investigation period or any time period for responding to CFIUS questions will be extended by the duration of the shutdown (unless the extension would cause the time period to end on a weekend or a holiday, in which case the time period would be further extended to the next business day). So, for example, if the shutdown lasts 14 days, a pending CFIUS investigation generally would be extended by 14 days. FIRRMA explicitly provides for the tolling of CFIUS deadlines during a government shutdown. In contrast, prior to the enactment of FIRRMA, the CFIUS clock kept running during a shutdown, leading some cases in the review stage to be rolled over into the investigation phase and some cases in the investigation phase to be withdrawn and refiled, thereby restarting the CFIUS clock.
- **Parties should expect delays following the cessation of the shutdown:** Although parties can submit joint voluntary notices and mandatory declarations to CFIUS during the shutdown, no action will be taken on them until the shutdown ends. Given CFIUS' heavy

caseload, the temporary halt to CFIUS' review of pending cases, and the submission of additional filings during the shutdown, parties that have declarations or notices pending, submit filings during the shutdown, or submit filings shortly after the shutdown ends (i) should expect delays in CFIUS response times and (ii) face an increased risk that cases in the review stage will proceed to the investigation stage and cases in the investigation stage will have to be withdrawn and refiled.

Parties with transactions currently under antitrust or CFIUS review, or that may be required to submit notifications to the government during the shutdown, should confer with HSR or CFIUS counsel to determine the impact of the shutdown.

## Contacts



HSR

**Michele S. Harrington**

Partner, Northern Virginia

T +1 703 610 6173

[michele.harrington@hoganlovells.com](mailto:michele.harrington@hoganlovells.com)



HSR

**Robert F. Baldwin, III**

Senior Associate, Washington, D.C.

T +1 202 637 2092

[robert.baldwin@hoganlovells.com](mailto:robert.baldwin@hoganlovells.com)



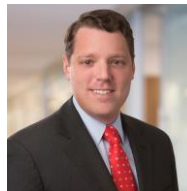
HSR

**Tracy Penfield**

Senior Associate, Washington, D.C.

T +1 202 637 5593

[tracy.penfield@hoganlovells.com](mailto:tracy.penfield@hoganlovells.com)



CFIUS

**Anthony V. Capobianco**

Partner, Washington, D.C.

T +1 202 637 2568

[anthony.capobianco@hoganlovells.com](mailto:anthony.capobianco@hoganlovells.com)



CFIUS

**Brian P. Curran**

Partner, Washington, D.C.

T +1 202 637 4886

[brian.curran@hoganlovells.com](mailto:brian.curran@hoganlovells.com)



CFIUS

**Robert D. Kyle**

Partner, Washington, D.C.

T +1 202 637 5494

[robert.kyle@hoganlovells.com](mailto:robert.kyle@hoganlovells.com)



CFIUS

**Roy (Ruoweng) Liu**

Counsel, Washington, D.C.

T +1 202 637 4837

[roy.liu@hoganlovells.com](mailto:roy.liu@hoganlovells.com)

CFIUS

**Patrick Miller**

Law Clerk, Washington, D.C.

T +1 202 637 6526

[patrick.miller@hoganlovells.com](mailto:patrick.miller@hoganlovells.com)

[www.hoganlovells.com](http://www.hoganlovells.com)

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members. For more information about Hogan Lovells, the partners and their qualifications, see [www.hoganlovells.com](http://www.hoganlovells.com).

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2019. All rights reserved.