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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Shutdown Pushes Antitrust Agencies Into Merger 'Triage'

By **Bryan Koenig**

Law360 (January 7, 2019, 7:20 PM EST) -- The government shutdown has forced unpaid skeleton crews at the U.S. Department of Justice and the Federal Trade Commission to focus only on mergers with ticking review clocks, shunting others to the back of the line as the antitrust bar plays the waiting game.

Handling the shutdown forced by President Donald Trump, experts say, has required a "triage" approach for merger reviewers at the agencies operating at significantly reduced staffing. Forty three percent of the FTC's Competition Bureau must keep working without a paycheck while the DOJ's contingency plan kicked in when the Antitrust Division ran out of funding Monday, forcing the furlough of all but 40 percent of its staff.

That means the priority, especially at the FTC, is mergers with a statutorily-mandated 30-day review period under the Hart-Scott-Rodino Act.

"If you have a matter with no clock running, staff just get sent home," said Debbie Feinstein, head of Arnold & Porter Kaye Scholer LLP's global antitrust group and former director of the FTC's Bureau of Competition.

Merger reviews, Feinstein told Law360, are being prioritized on a case-by-case basis.

At the back of the line are mergers with no statutory deadlines, including those currently in the process of a more in-depth "second request" from the DOJ or FTC. Those probes get a deadline again when reviewers certify that the merging parties are in "substantial compliance" with the government's request, which gives the agencies 30 days to act.

For deals without that certification, "they won't have any staff working on the merger reviews," said Crowell & Moring LLP antitrust partner and FTC alum Alexis J. Gilman, who warned that limited staffing could spur the agencies to miss something they otherwise wouldn't.

One major drain on the FTC's resources appears to be the ongoing trial accusing Qualcomm of violating antitrust laws through its patent practices. The 10-day California bench trial kicked off Friday and appears poised to proceed at least until the federal courts run out of money, which is currently expected to happen Jan. 18.

The government also appears to be shunting non-merger work without statutory deadlines, like conduct probes, to the back of the line. "All those are on hold," said Skadden Arps Slate Meagher & Flom

LLP partner David P. Wales, an FTC and DOJ alum who said he knew of several non-merger civil matters put on the backburner during the shutdown.

“As to litigated matters, in cases in which preliminary relief has already been obtained or where there has been no plan to seek preliminary relief, commission attorneys will notify opposing parties and courts of the government shutdown, and request suspensions of dates ... to preserve the government’s claim,” the FTC says in its shutdown contingency plan. “Pending court action on such motions for stay, staff may need to continue working.”

At the same time, the agencies also aren't granting any early terminations of the HSR clocks, a common practice allowing uncontroversial mergers to close before the full 30 days run down.

“They’re now needing to wait that full 30 days,” said Andrea Agathoklis Murino, a partner and co-chair of Goodwin Procter LLP’s antitrust & competition law practice who has spent time at both the DOJ and FTC.

The agencies are good at “triage,” even at the slowed pace of a shutdown, Murino told Law360.

“It doesn’t seem as if they’re sitting on their hands,” she said — the agencies are still investigating mergers that need to be probed.

The triage approach is, however, sure to cause delays and create uncertainty for parties trying to navigate the merger review process.

One victim of the shutdown is the FTC’s Premerger Notification Office, which will be open only to “accept new filings and to organize those filings,” according to the FTC’s contingency plan. During the shutdown, according to Weil Gotshal & Manges LLP global antitrust co-head Kevin Arquit, also a former competition bureau director, the office won’t be answering questions from parties unsure whether a given filing is required.

“That can be a very real cost to merging parties,” said Arquit, who noted the filing rules can be byzantine and hard to navigate. Without the office to offer advice, he said, parties will have to “make more educated guesses.”

The government has however developed considerable experience with shutdowns. Former FTC chair Maureen K. Ohlhausen said that as potential shutdowns approach, the agency will typically dust off past contingency plans and see what needs to be updated.

“They’re managing as best they can, given the requirements,” she said.

The agencies have gone through the process so many times that staff have begun including language anticipating a closure in the model timing agreements that are sometimes used to create a specific framework for investigators.

The model timing agreement the FTC includes on its website, for instance, extends deadlines by one day for every partial or total day of government shutdown because of “an announcement by the Office of Personnel Management or [because of] a lapse in appropriations from Congress.”

The agencies' thinking is defined heavily by timing. And the FTC may end up pursuing a more conservative approach to issuing second requests, which relieve the 30 day HSR clock, some attorneys say.

Normally, according to Arquit, parties in more controversial mergers will start talking with the agencies a few weeks out from the HSR deadline to try and avoid a costly second request if possible. But during the shutdown, the agencies may not have the resources for such informal communications.

"They're going to err on the side of giving themselves the extra time," Arquit said.

Not everyone agrees more second requests are likely though. Feinstein, who headlined the competition bureau during the 2013 shutdown, said that furloughed personnel can be brought back in for mergers with ticking 30 day clocks.

"They have the crew they need to work on any given matter," Feinstein said further. "It's not like things fall through the cracks."

The government's focus during the shutdown is on immediate threats to "human life or property." For the DOJ's Antitrust Division, that means prioritizing scheduled criminal proceedings and civil suits where judges refuse to grant continuances.

Antitrust Division employees, the DOJ said in its contingency plan, will also work cases facing HSR deadlines or those imposed by a statute of limitations "only when an extension or waiver cannot be obtained and [division] leadership determines that allowing a proposed merger to go forward without objection would pose a reasonable likelihood of peril to property in which the United States has an immediate interest."

The shuttered FTC did not respond to a request for comment Monday. The DOJ had been using "available funds" to continue operations for as long as they lasted, but a spokesman said that money ran out Monday.

"Effective today, the Antitrust Division is beginning to execute their contingency plan which outlines which employees and critical functions should continue, and therefore be excepted from the furlough," Wyn Hornbuckle said in an email. "Excepted employees will continue working without pay while employees who are not excepted will be furloughed until an appropriation is passed." The DOJ, Hornbuckle said further, will continue to receive and review HSR applications during the shutdown.

The real worry of a shutdown, Feinstein said, is if it stretches beyond a few weeks — Trump and some of his administration have threatened a shutdown that could last months or years. A shutdown of a few weeks shouldn't have major impacts on pending deals other than basic interference with timing, according to Feinstein.

But "it gets a lot more complicated" if the shutdown lasts longer, she said.

--Additional reporting by Matthew Perlman. Editing by Melissa Lipman and Pamela Wilkinson.