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**M&A** Broader, More Frequent Second Requests Expected as Shutdown Continues

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**Takeaways**

- As most of the the federal government remains closed, merging parties should expect further delays in their antitrust reviews, according to several antitrust practitioners who spoke with Reorg M&A.
- Debbie Feinstein, head of the global antitrust group at Arnold & Porter, said that during the shutdown there might be fewer people involved in the review of any particular merger. Matters are deemed either essential or non-essential, and even the staffers who are working on essential matters are not allowed to work on non-essential matters, she said.
- Practitioners also told Reorg M&A that the continuance of the shutdown would likely lead to more second requests. They said they expect such second requests to be broader in scope than would normally be the case.

As the U.S. government shutdown continues, mergers are likely to be affected by tactics such as pull-and-refiles and overly broad second requests, according to several antitrust practitioners who spoke with Reorg M&A.

Debbie Feinstein, head of the global antitrust group at Arnold & Porter, said that during the shutdown there might be fewer people involved in the review of any particular merger. Many companies are dealing with the shutdown situation by pulling and refileing, said Feinstein, who was previously the director of the FTC Bureau of Competition.

Merger investigations are deemed either essential or non-essential, and even the staffers who are working on essential matters are not allowed to work on non-essential matters, she said. Matters are deemed essential if there is a timeline, because the government might lose its ability to take action after certain deadlines, Feinstein added.

According to George Paul, an antitrust partner at White & Case, the DOJ and FTC will issue more and broader second requests during the shutdown. "I anticipate that we will see more transactions [receiving second requests] because the agencies are essentially playing defense and buying more time," Paul said.

An antitrust practitioner who represents clients before the agencies agreed, noting that second requests are "kind of the only way for them to stop the clock" on transactions nearing the end of their initial or extended waiting period.

As the longest shutdown in U.S. history has now entered its 33rd day, many transactions have already seen extensions in their reviews. For instance, companies in major telecom transactions have [pulled and refiled](#) their paperwork, while companies in the defense industry have received [second requests](#) during the shutdown.

Jay Levine, co-chair of the antitrust and consumer protection group at the law firm Porter Wright Morris & Arthur, said the shortage of economists at the agencies has likely delayed transactions. "Economists are fairly integral to many things in investigations," said Levine. "They're relevant to analyses staff want conducted, and even interviews of industry witnesses. Staff may have certain questions they want to understand."

Both the DOJ and FTC have operated with partial staffing on merger reviews since the shutdown started. Under the [DOJ's contingency plan](#), only about 40% of division staff have continued work, a little over half being attorneys, while under the [FTC's latest plan](#), only 43% of the Bureau of

Competition and 9% of the Bureau of Economics are expected to continue working. It is unclear exactly how many economists are currently available at each agency.

A lack of economists can be particularly important when staff considers issuing a second request. When the agencies during the shutdown see that a transaction could reasonably carry antitrust concerns, they may not have the economists available to help narrow the scope of information described in the second request to the merging parties. For this reason, second requests are more likely to be overly broad in scope during the shutdown, causing companies to spend additional time and money to comply, Levine said.

Paul agreed that second requests will likely be broader, noting that the agencies likely have limited time to work out the scope with merging parties. “With such limited resources, the agencies will not have sufficient time to work with the parties to eliminate any but the most basic potential overlaps,” according to Paul. “Instead of working with the parties to eliminate potential areas of concerns, the staff will be forced to devote all of their efforts to ensuring that the second request does not let any problematic overlaps slip through the cracks.”

According to Amanda Wait, an antitrust partner at Norton Rose Fulbright, the agencies typically aim to get the scope of second requests “just right,” which is a tough task during the shutdown. “They try hard to maintain those cooperative practices,” said Wait, who previously worked at the FTC. Usually, agency staff will undertake multiple discussions with the merging parties to try to come to agreement on a second request’s scope. “But that often cannot happen during the shutdown,” she said.

--Matt Tracy, Ryan Lynch and Alexandra Wilts

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