

Merger Reviews During Budget Brinkmanship

--By Justin P. Hedge, Arnold & Porter LLP

Law360, New York (May 9, 2011) -- When Congress finally agreed on a 2011 budget compromise less than two hours before a shutdown of the federal government would have taken effect on April 8, many breathed a sigh of relief. But the measure that passed on April 8 was just a stopgap measure. The budget was not really put to bed until six days later when Congress passed and the president signed a bill funding the rest of the fiscal year.

Following the technicalities of all the various appropriations bills can make one go a little cross-eyed. And now that the dust has settled some, it seems that while the 2011 budget resolution eliminated the possibility of an imminent shut-down in April, we are far from out of the woods yet.

First, the 2011 appropriations that passed provide financing only through the end of the federal government's fiscal year in September — less than six months away. And as soon as the 2011 budget was settled, the political debate over the 2012 budget took off with the same vigor as the 2011 budget controversy.

Republicans countered the president's 2012 budget proposal which included some \$1.1 trillion in spending cuts over the next 10 years with a proposal of their own providing for approximately \$5 trillion in cuts, more than 130 times the \$38 billion cut in the 2011 compromise. The magnitude of these proposals raises the stakes for the debate considerably and if we were just two hours away from a shutdown on the 2011 budget, what is the outlook for a timely compromise for 2012?

Second, even before a possible budget showdown this fall, members of both parties have threatened to tie spending reductions to authorization for the Treasury to issue more debt. Without this authorization, the Treasury would be unable to fund existing operations and obligations, including potentially federal civil service salaries, which could raise again the specter of a shutdown.

The Treasury department estimates that it will reach current the debt ceiling by May 16. Even putting the usual political rhetoric in perspective, it seems that we may very well be forced to deal with the practical consequences of a shutdown again soon. But what does this mean for antitrust practitioners?

A shutdown of the federal government is highly disruptive to business as usual. But one can forget just how far reaching the disruption is until arriving at the brink. Memories have inevitably faded since the last shutdown 15 years ago but considering the implications of a shutdown is an important element of counseling clients with transactions before the agencies.

Budget shutdowns are governed by the Antideficiency Act,^[1] as amended, which prohibits agency spending in advance of an appropriations bill from Congress except for certain exempt essential services. Attorneys advising clients on antitrust review of mergers need to know what will be considered an exempt service leading up to a shutdown:

- Will the agencies' premerger notification offices be accepting new filings? Can a filing be withdrawn?
- Will a merger continue to be investigated during a shutdown? If not, what happens to the statutory waiting periods? What about any negotiated timing agreement?
- If the waiting period expires during the shutdown can a transaction close? Does closing risk a challenge to the consummated transaction?
- Can one approach an agency to begin negotiating a consent?
- Will anyone be able to approve divestiture buyers?

Although a shutdown related to the debt ceiling may take a different form, the same issues will need to be addressed. The answers to such questions can be crucial to merger strategy and essential to making sure fragile deals, particularly large ones that are difficult to keep together, remain viable. The viability of transactions seems like something that the antitrust agencies ought to be particularly sensitive to as part of the overall economic recovery effort.

The 1995 shutdown had interesting implications for merger review. During that shutdown the [Federal Trade Commission](#) was able to fund some operations using money from the Hart-Scott-Rodino Act filing fees so it remained open. In contrast, the U.S. [Department of Justice Antitrust Division](#) premerger office was closed for several days. As a result, mergers filed during the shutdown were deemed not to have been complete since only the FTC received the filing and a filing at both agencies is required to start the statutory waiting period.

Leading up to the deadline on April 8, information about the merger review agencies' operations was scarce. It was only on the final day before a shutdown that the FTC released its plan, and the DOJ released no formal plan at all.

The FTC stated that it would remain open for new filings and that it would continue to review mergers "to the extent that the circumstances of a reported merger or acquisition indicate that a failure by the government to challenge the transaction before it is consummated will result in a substantial impairment of the government's ability to secure effective relief at a later time."^[2]

Where exactly that line would be drawn, however, was not addressed, leaving room for case-by-case determinations during the shutdown. And other important questions also remained unanswered such as what would be the review status of mergers yet to be formally noticed where consent negotiations were underway? Would those be put on hold, leaving companies in limbo with no progress towards resolution?

The FTC's press release stated that "the commission has coordinated with the Department of Justice on how they will handle the agencies' jointly statutorily mandated responsibility to accept Hart-Scott-Rodino filings" but the DOJ never made any formal statements regarding its operations in the event of a shutdown. Could the HSR waiting period — which requires a filing with both DOJ and FTC — begin to run if the DOJ was not open to accept filings?

Would the DOJ draw the same lines as the FTC on what deals would continue to be investigated under a shutdown? How would clearance decisions be made if the FTC was operating and the DOJ was not? And for both agencies, was there any serious risk that second requests could be issued just to extend review timelines? While having some guidance from the FTC was welcome, many questions remained, leaving attorneys and their clients with numerous uncertainties about the implications of a shutdown for their particular situation.

With more sharp debate about future government financing still on the front page, what can be done to make merger review smoother for the next time there is a congressional standoff? Cooperation between the DOJ and FTC ebbs and flows depending on the enforcement agenda of each agency. Putting in place a standard shutdown operations policy and widely publishing that policy seems like a great opportunity for the agencies to come together.

But the agencies do need a certain amount of flexibility depending on the nature of their caseloads whenever a shutdown threatens, so perhaps clear guidance will never be a reality. That leaves the burden with clients to be prepared and they might do well to consider their own contingency plan.

Anticipating a slower or nonexistent review during a shutdown in a merger agreement could stave off having to reopen potentially contentious negotiations with the target later, which is not always possible regardless.

Also, considering the recent uptick in consummated merger challenges like ProMedica in which the FTC obtained a preliminary injunction in March, clients might also want avoid being forced to close under their agreement just because a waiting period expired if they are without comfort that the government investigation is completed.

It might not be necessary to include provisions addressing such concerns in corporate negotiations just yet, but then again it may not be too long before practitioners are back scrambling for answers from the antitrust agencies before the lights go out.

--By Justin P. Hedge, Arnold & Porter LLP

Justin Hedge is an associate in Arnold & Porter's Washington, D.C., office in the firm's antitrust and consumer protection practice group.

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[1] 31 U.S.C. § 1341 et seq.

[2] Press Release, Federal Trade Commission, Shutdown of Federal Trade Commission Operations upon Failure of the Congress to Enact Appropriations (April 8, 2011) (previously available at <http://www.ftc.gov/opa/2011/04/shutdown2011.shtm>, copy on file with author).