Antitrust and Competition Law

FTC Reverses Quarter-Century of Enforcement Policy

By: Lee K. Van Voorhis and Douglas E. Litvack

In a move widely expected after the Federal Trade Commission's Democratic majority rescinded a 1995 policy in July, the FTC issued a policy statement yesterday requiring prior approval provisions for settlements in future transactions affecting any relevant market for which they alleged a violation.[1] The 1995 policy was *not* to require prior approval provisions as part of a consent decree, settlement, or enforcement order absent extraordinary circumstances (typically where one of the parties to the decree had a history of doing anticompetitive transactions below the HSR threshold). Now, the FTC will require a prior approval provision for all merging parties that resolve antitrust issues subject to a Commission Order. The FTC also appears likely to pursue a prior approval order even when the parties abandon a transaction after substantially complying with a Second Request. Under a prior approval provision, the party must obtain the FTC's permission before consummating any transaction subject to the provision. As the statement suggests, the FTC could simply reject the transaction without having to provide a court with sufficient evidence to show the transaction violates the law.

Styled as a measure to "preserve Commission resources," the overall effect of the policy on transactions may not be that clear. However, this new policy will certainly add additional risk to any transaction that could be resolved with a divestiture because the parties will need to give the FTC veto power over future deals in that relevant market – and perhaps even beyond that market, as the FTC bragged about in a consent decree also released yesterday. The new Commission policy states that in certain cases where "stronger relief is needed," the prior approval order may include geographic and product markets beyond those in the instant transaction. Because of the veto power and the threat of an expansive prior approval provision, parties may be more likely to litigate a transaction's legality rather than settle with the FTC and accept a provision that will hamstring their ability to do future deals. It therefore appears that this policy may inadvertently incentivize *more* costly merger litigation for both the FTC and defendants, opening the question of whether the policy change might actually cost more in Commission resources than the former policy, which did not penalize companies in this way for settling antitrust disputes with the FTC.

Parties to a transaction that might trigger a consent decree due to antitrust issues should consider fixing any antitrust issues first, by, for example, carving those assets out of the transaction upfront. While the FTC discourages "fix-it-first" solutions, and has brought suits attempting to challenge the entire deal, it has generally lost in court. Courts have found that the FTC must "litigate the fix," meaning it must prove that the transaction with the proposed solution violates the law.

For further advice on transactions in the era of the Biden FTC, see our videos or reach out to us directly.

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[1] The stated vote was 3-2, which means it must have been taken prior to October 12, when former Federal Trade Commissioner Rohit Chopra was sworn in as the Director of the Consumer Financial Protection Bureau. Both Republican Commissioners dissented.

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