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ANTITRUST TRADE AND PRACTICE

FTC Signals Harsher Merger Review Stance

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Building upon its aggressive stance on merger enforcement, in its hearing on July 21, 2021, the Federal Trade Commission voted 3-2 along party lines to rescind its 1995 policy statement, which had limited the Commission's use of "prior notice" and "prior approval" provisions in merger clearance settlements. Although prior notice provisions only require companies to give the FTC advance notice of future transactions, prior approval provisions are much more burdensome, effectively forcing companies to proactively show that a transaction would not reduce competition. The 1995 policy itself revoked a prior FTC policy requiring merging parties, as a condition of FTC approval of a particular merger, to agree in merger settlements to provide the Commission with prior notice of, and obtain prior Commission approval for, all future transactions above a de minimis value in the same product and geographic markets for the next ten years. See Press Release, "FTC Acts To Reduce Prior-Approval Burden on Companies in Merger Cases" (June 22, 1995). Looking ahead, the reimplementation of such provisions in merger settlements may have the potential to have a chilling effect and unforeseen consequences for any company even contemplating a merger.

Background and the 1995 Policy Statement

The FTC uses merger clearance settlements, also called consent decrees, to stipulate the terms by which it will allow parties to close a proposed merger. Generally, these settlements describe the assets that the parties agree to divest and the terms of such divestiture. The 1995 policy statement announced that the FTC would no longer, as a matter of course, include provisions in its merger clearance settlements requiring the settling parties to receive prior approval from the Commission for future transactions in the same market.

The stated goal of the 1995 policy was to strike a balance between alleviating the burden for companies in FTC merger cases, while still protecting consumers from anticompetitive transactions. Then-Director of the FTC's Bureau of Competition, William J. Baer, said at the time that "Congress had a unique and critical role in mind when it created the Federal Trade Commission … . The Commission's goal is to protect consumers from anticompetitive conduct, but also to avoid overburdening of business. These new policies reflect that goal." *Id.* In the .Commission's view, the passage of the mandated prior notification and waiting periods in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) made the FTC's prior notice and prior approval clauses unnecessary. Nevertheless, the Commission retained the ability to include such clauses in certain limited circumstances such as, for example, where there was a "credible risk" that the settling merging parties might later pursue a competition-reducing transaction below the HSR notification thresholds. However, the FTC only included one prior approval provision among all of its 2020 orders. See Oral Remarks of Comm'r Wilson, *Regarding Care Labeling Rule, Repair Restrictions Imposed by Manufactures and Sellers, and Prior Approval and Prior Notice Provisions in Merger Cases* (July 21, 2021).

A Divided Vote

The recent vote to rescind the 1995 policy and return to the pre-1995 requirement that merger-related

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settlements with the Commission include prior notice and prior approval provisions was along party lines, with the two Republican commissioners in the minority highly criticizing the rescission and urging the Commission to seek further input on the costs and benefits of rescinding the 1995 policy statement. See Press Release, "FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers" (July 21, 2021).

The Democratic Commissioners expressed that, by rescinding the 1995 policy, the Commission regains an important law enforcement tool, especially in the current environment where the Commission's staff is about half the size that it was in 1980, yet is simultaneously tasked with reviewing a record-breaking number of merger filings. By way of example, in July 2021, there were 343 mergers that met the HSR reporting threshold, compared to 112 such transactions in July 2020. See Premerger Notification Program, Fed. Trade Comm'n (last visited Aug. 23, 2021). Large upticks in merger filings are not uncommon, though, and rarely lead to such drastic policy changes. For example, there was an over 20% increase in HSR-reportable transactions between the 2013 and 2014 fiscal years. See FTC & Dep't of Justice, Antitrust Div., *42nd Hart-Scott-Rodino Annual Report: Fiscal Year 2019*, at 1.

Proponents of the rescission, including newly appointed FTC Chair Lina Khan, believe that it will prevent the Commission from arbitrarily choosing when to exercise its enforcement power and ultimately will reduce costs. Prior approval clauses may save limited agency resources and taxpayer dollars by stopping anticompetitive mergers before the FTC spends months or longer investigating a proposed merger, pursuing legal action to challenge it, and negotiating with the companies to enter into a settlement agreement. See Remarks of Chair Khan, *Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions* (July 21, 2021). As Chair Khan explained, "Since the FTC substantially reduced using these prior approval provisions, the agency has encountered numerous examples of companies repeatedly proposing the same or similar deals in the same market, despite the fact that the Commission had earlier determined that those deals were problematic … . Without a prior approval provision, the Commission must initiate a whole new investigation and then go into court to block the deal anew. This additional burden drains the already strapped resources of the Commission." See Press Release, "FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers" (July 21, 2021). In short, supporters of the policy rescission believe that, although prior notice and prior approval provisions will impose a cost on a greater number of companies, these provisions will still reduce costs overall because of the significant expense of investigating and litigating merger challenges.

> The reimplementation of such provisions in merger settlements may have the potential to have a chilling effect and unforeseen consequences for any company even contemplating a merger.

Republican Commissioner Noah Phillips criticized the vote, stating, "Today, the majority chooses to impose a decade-long M&A tax on anyone who enters into a merger consent … . Meaning, companies will be less likely to work with the Commission to resolve competitive concerns." See Dissenting Statement of Comm'r Phillips, *Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases* (July 21, 2021). Commissioner Phillips emphasized that the HSR Act's mandated 30-day waiting period for transactions has proven to be an effective tool for regulators to investigate and challenge anticompetitive deals before they are completed. By rescinding the 1995 policy, Commissioner Phillips warned, the Commission might actually be reducing competition. A company subject to the Commission's prior notice and approval requirements might not be considered by an acquisition candidate to be a viable buyer or might decline to bid against its rivals to acquire such an acquisition candidate after deciding that compliance with the order imposes too high an additional cost. Likewise, a buyer could view the risk of the potential post-merger divestiture of a product line or facility as acceptable, but not the prior notice and prior approval requirements if it were to enter into a settlement with the FTC. Thus, according to Commissioner Phillips, rescission of the 1995 policy statement could both make a bidding process less competitive and dissuade companies from entering into procompetitive transactions that would actually promote competition and help consumers. *Id.*

Commissioner Wilson strongly echoed Commissioner Phillips' dissent, saying that she was concerned the rescission of the 1995 policy would have a chilling effect on procompetitive transactions.

She was also concerned about the power the Commission was seizing and urged that, "If the majority wishes to overhaul the pre-merger notification framework and flip the burden of proof in large swaths of mergers, it should ask Congress to pass the appropriate legislation." Oral Remarks of Comm'r Wilson, *Regarding Care Labeling Rule, Repair Restrictions Imposed by Manufactures and Sellers, and Prior Approval and Prior Notice Provisions in Merger Cases* (July 21, 2021). Furthermore, she warned that by rescinding the 1995 policy, the Commission would create substantial differentiation between its use of prior notice and approval provisions and those of the DOJ, enhancing "perceptions that the agencies apply different standards and processes, and give ammunition to those who seek to consolidate jurisdiction at the DOJ." Id.

Potential Impact

This new policy could seriously complicate consent order negotiations between the Commission and merging parties, thereby impeding the FTC's cost-savings goal. Typically, the merging parties and the FTC agree in a consent order to divestitures as a condition of Commission approval. Adding prior notice or prior approval provisions could deter merging parties from settling with the FTC. The parties might instead opt to litigate the merger challenge to avoid being subject to those requirements for future transactions, thus adding time and cost to the Commission. Merger agreements might begin to include provisions requiring the buyer to accept the FTC's new prior notice and approval clauses. At the very least, rescission of the 1995 policy statement promises to increase the timeline, and thus the cost, for companies subject to such a prior approval clause, since even transactions that fall below the HSR threshold will need to be reported to, and approved by, the Commission.

Increasing Merger Review Hostility Under the Biden Administration

The rescission of the 1995 policy statement is consistent with the Biden administration's tougher stance on merger review and enforcement. President Biden appointed Lina Khan as FTC Chair and nominated Jonathan Kanter as head of the DOJ's Antitrust Division, both outspoken critics of previous antitrust enforcement regimes. Moreover, under the Biden administration, the antitrust enforcement agencies have already implemented some significant changes from previous administrations. In February, the FTC and DOJ issued a joint statement announcing that both agencies would suspend early merger clearances under HSR, and although the agencies have said that this suspension would be temporary, early termination of the HSR waiting period has not returned more than half a year later. See Press Release, "FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination" (Feb. 4, 2021). More recently, on August 3, the FTC announced in a blog post that it has begun sending letters to merging parties whose deals the FTC has not been fully able to review, alerting the parties that its investigation of the transaction was ongoing. Therefore, parties choosing to continue with such transaction do so "at their own risk," since the FTC may still decide the proposed deal is unlawful and pursue action. See Holly Vedova, *Adjusting merger review to deal with the surge in merger filings*, FTC Competition Matters Blog (Aug. 3, 2021 12:28 PM). Commissioner Wilson criticized this move in conjunction with the suspension of early termination and rescission of the 1995 policy, saying that she is "gravely concerned that the carefully crafted HSR framework is suffering death by a thousand cuts." Statement of Comm'r Wilson, *Regarding the Announcement of Pre-Consummation Warning Letters* (Aug. 9, 2021).

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Conclusion

Practically, it remains to be seen in what circumstances and how frequently the FTC will impose prior notice and prior consent provisions. The pre-1995 policy provisions generally lasted for ten years and were limited to transactions in the same geographic and product market as the original merger. For now, though, the rescission of the 1995 policy statement could create uncertainty in the merger enforcement process, as prior notice and approval clauses may carry significant business consequences, especially for companies that are highly acquisitive.