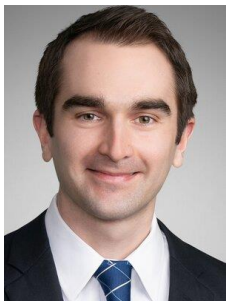
Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

A Look At M&A Conditions After FTC's Exxon-Pioneer Nod

By **Ryan Quillian and John Kendrick** (June 4, 2024, 3:47 PM EDT)


Ryan Quillian


John Kendrick

On May 2, in a divided 3-2 vote, the Federal Trade Commission issued a consent decree imposing several conditions on Exxon Mobil Corp.'s acquisition of Pioneer Natural Resources Co. The commissioners issued four separate statements explaining their votes.

The consent decree and the commissioners' statements illustrate several points about the current merger enforcement environment:

- In-depth merger investigations can cast a wide net beyond the particular merger at issue, and with the forthcoming Hart-Scott-Rodino Act rules, every merger filing will require the production of an expansive set of documents.
- Recent policy statements and enforcement actions indicate that the FTC and U.S. Department of Justice Antitrust Division will investigate and — potentially — challenge a wider scope of deals than has previously been the case.
- Enforcement against actual and potential board interlocks is increasing, including interlocks beyond the scope of Section 8 of the Clayton Act.
- The Exxon consent decree does not signal a greater willingness by the agencies to accept prelitigation consent decrees in merger investigations, about which the agencies have expressed extreme skepticism, outside of these specific circumstances.
- In light of the commissioners' statements accompanying the consent decree, expect further investigations in the energy and pharmaceutical sectors, particularly of companies that have faced antitrust scrutiny in the past.

Background

Last October, Exxon agreed to acquire Pioneer, a domestic producer of crude oil and natural gas with operations concentrated in the Permian Basin. The merger agreement required Exxon to propose Pioneer's founder and former CEO — Scott Sheffield — as a candidate for Exxon's board, if certain conditions were met.

That requirement was the FTC's central concern with the merger; there were no vertical, horizontal or

other harms to competition alleged in the complaint.

Citing Sheffield's public statements and private messages produced during the merger investigation, the FTC alleged that he had previously sought "to organize anticompetitive coordinated output reductions between and among U.S. crude oil producers, and others, including OPEC."[1]

According to the complaint, Sheffield's attempts would allegedly be more likely to succeed following the merger because his position on Exxon's board would give him a larger platform and decision-making input on Exxon's production activities. Thus, the FTC alleged "the effect of [the merger] may be substantially to lessen competition," in violation of Section 7 of the Clayton Act.

Relatedly, given Sheffield's service on the board of a different entity competing with Exxon — the Williams Cos. Inc. — the FTC also alleged that his appointment to Exxon's board would create an illegal board interlock under Section 5 of the FTC Act.

The consent decree claimed to address these concerns by prohibiting Sheffield and, for five years, certain other Pioneer representatives from serving on Exxon's board and by imposing related restrictions.

The two newly appointed Republican commissioners — Andrew N. Ferguson and Melissa Holyoak — issued a joint dissenting statement.[2]

They expressed doubts that Sheffield would actually be appointed to Exxon's board following the acquisition, pointing out that the merger agreement only required Exxon to nominate him for the board — he would still need shareholder approval — and that, in any event, "[t]o its credit, Exxon intends to exclude Sheffield from serving on the board."

Setting that aside, the dissenters also argued that the deal, as proposed, did not meaningfully increase the risk of collusion, in part because it left industry concentration virtually unchanged. Similarly, they expressed:

concern with the Complaint's focus on Sheffield's past conduct at Pioneer as an indicator of Exxon's future actions, without any discussion of whether Exxon has incentives to engage in the same behavior. Focusing on individuals' conduct divorced from a firm's incentives could have troubling ramifications for future enforcement actions.

Pioneer, for its part, vigorously disputed the FTC's allegations in a detailed press release, stating that the FTC's complaint "reflects a fundamental misunderstanding of the U.S. and global oil markets and misreads the nature and intent of Sheffield's actions."[3]

According to Pioneer, Sheffield's statements concerned legitimate topics like investor relations and matters of broader public concern, including "unfair foreign practices that threatened to undermine U.S. energy security; and, through dialogue with government officials, the need to sustain a resilient, competitive and economically vibrant oil and gas industry in the United States."

Pioneer also claimed that some of his statements were protected by the First Amendment and therefore immune from antitrust scrutiny under the Noerr-Pennington doctrine.[4]

Takeaways

The Exxon-Pioneer matter illustrates several aspects of the current merger enforcement environment.

Merger investigations can cast a wide net beyond the particular merger at issue.

Potential post-merger anti-competitive conduct historically has been outside the scope of issues typically assessed in merger reviews.

However, the FTC has recently sought to incorporate post-merger conduct into its merger reviews, such as through its attempted resurrection of the so-called entrenchment theory, which both agencies publicly abandoned years ago.[5]

As the two dissenting commissioners argued in the Exxon matter, "the Commission is leveraging its merger enforcement authority to extract a consent from Exxon," and "[t]he Commission should not leverage its merger enforcement authority — or any authority — the way it does today."

Whether merger-specific or not, this is an example of how in-depth merger investigations — which require voluminous document productions — carry risks beyond traditional merger-related considerations.

While relatively few deals face in-depth investigations,[6] the forthcoming HSR rules are likely to require companies to produce significantly more documents, including documents that are not necessarily related to the merger, in every reportable transaction as part of the initial filing.

Agencies seek to prevent even speculative risk of anti-competitive harms.

The complaint alleged that the merger was unlawful primarily "because it would meaningfully increase the likelihood of industry coordination." Commissioner Alvaro Bedoya's concurring statement emphasized the Clayton Act's risk-assessment framework and breadth, describing the agencies' burden as "reasonable grounds to believe that the effect of this merger may be to substantially lessen competition in any line of commerce or in any activity affecting commerce in any section of the country."[7]

This continues a trend: The agencies recently have made clear their view that merger enforcement is fundamentally about risk prevention, which they believe widens the scope of challengeable deals and lowers their burden of proof.

This risk assessment framework is reflected throughout the new merger guidelines — cited in the Exxon complaint — which explain that "Section 7 [of the Clayton Act] was designed to arrest anticompetitive tendencies in their incipiency."[8]

High-level agency officials have emphasized this theme in public statements, including from the DOJ's Assistant Attorney General Jonathan Kanter at the 2023 Georgetown Antitrust Law Symposium on Sept. 19, 2023, who said "merger enforcement should be more risk-averse than a Sherman Act analysis."[9]

The FTC's Section 5 Policy Statement goes even further by claiming that Section 5 covers deals outside the scope of other antitrust laws, such as deals that merely "have the tendency to ripen into violations of the antitrust laws."[10]

Scrutiny of board interlocks is increasing and widening.

The FTC alleged a second, independent potential harm from the deal: a board interlock that would have arisen from Sheffield's simultaneous service on the boards of Exxon and the Williams Co. — alleged competitors at various levels of the oil and natural gas industries.

While this is the latest in a series of FTC and DOJ actions against board interlocks, it is notable that the FTC relied exclusively on Section 5 of the FTC Act to support its claim, rather than Clayton Act Section 8 — which explicitly targets interlocks.

The FTC previously sought to lay the groundwork for this approach in its Section 5 Policy Statement, which the FTC asserts covers "interlocking directors and officers of competing firms not covered by the literal language of [Section 8 of] the Clayton Act."[11]

Here, the FTC may have used Section 5 because Section 8 only applies when there is an actual board appointment, and Sheffield had not yet been appointed. The consent agreement in Exxon suggests that the FTC plans to enforce Section 5 of the FTC Act against some interlocks that are beyond the scope of the Clayton Act.

In addition, the proposed changes to the HSR rules include a new section requiring merging parties to identify their officers, directors, and board observers — or equivalent individuals for noncorporate entities like LLCs — and all other entities on which those individuals serve similar roles.[12]

Given the agencies' increased interest and the likelihood of expansive reporting obligations, companies should consider evaluating any potential interlocks for current directors and officers and setting up a regular monitoring mechanism to identify interlocks that could arise over time.

This does not indicate a softening of the agencies' anti-remedy stance.

The consent agreement in Exxon was not a traditional structural remedy (i.e., imposing a divestiture) or a behavioral remedy (i.e., imposing conditions on post-merger competition-related conduct).

Rather, it addressed very specific circumstances that the FTC claimed to have uncovered during its investigation. As a result, we do not believe that Exxon signals a softening of the agencies' stated skepticism about merger remedies. Leaders at both agencies have expressed distrust of traditional prelitigation consent agreements.

For example, FTC Chair Lina Khan has said "[w]e're going to be focusing our resources on litigating, rather than on settling," and Kanter has said "[i]n most instances, the real remedy is to just block the merger entirely and that's our starting point."[13]

In the same vein, Sen. Elizabeth Warren, D-Mass., sent a letter to the FTC commissioners in November 2023 "urg[ing] the FTC to reject the use of remedies — both behavioral and structural — in merger review."[14] Accordingly, the FTC has not agreed to a prelitigation merger remedy since October 2022, and the DOJ has not accepted one since the Senate confirmed Kanter in November 2021.[15]

Expect further enforcement in the energy and pharmaceutical sectors.

The Analysis to Aid Public Comment in Exxon stated that the FTC "will continue to investigate mergers

and acquisitions activity in the oil and gas industry and its risks to competition, as well as problematic unilateral signaling and coordination and attempted coordination among market participants."[16]

Additionally, Commissioner Rebecca Kelly Slaughter's concurring statement noted that a company's "history of anticompetitive conduct" informs the likely effects of a merger, specifically calling out the pharmaceutical sector and the FTC's "strong enforcement track record in the pharmaceutical space."[17]

Slaughter's concurring statement went on to say "that the FTC does not approve mergers under any circumstances ... [t]his consent decree, like any other consent decree, should not be seen as resolving all competitive concerns this merger may present."

Given all of this, it is reasonable to expect that the antitrust agencies will continue to focus on the energy and pharmaceutical sectors, particularly on companies that have faced antitrust scrutiny in the past.

Ryan K. Quillian is a partner at Covington & Burling LLP. He was previously deputy assistant director of the Technology Enforcement Division at the FTC.

John Kendrick is an associate at Covington.

Covington partners Timothy C. Hester and James R. Dean Jr. contributed to this article.

[1] Complaint, In the Matter of Exxon Mobil Corporation, FTC File No. 241-0004, (May 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneercomplaintredacted.pdf.

[2] Joint Dissenting Statement of Commissioner Melissa Holyoak and Commissioner Andrew N. Ferguson, In the Matter of Exxon Mobil Corporation, FTC File No. 241-0004, (May 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneermh-afstmt.pdf.

[3] Press Release, Pioneer Natural Resources Responds to FTC Settlement Complaint Filed as Part of Approval of Proposed Transaction with ExxonMobil, (May 2, 2024), https://investors.pxd.com/investors/news-releases/news-details/2024/Pioneer-Natural-Resources-Responds-to-FTC-Settlement-Complaint-Filed-as-Part-of-Approval-of-Proposed-Transaction-with-ExxonMobil/default.aspx.

[4] "Those who petition government for redress are generally immune from antitrust liability." Professional Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56 (1993) (citing Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); Mine Workers v. Pennington, 381 U.S. 657 (1965)). Sheffield subsequently filed a23-page public comment on the consent decree, in which he responded in detail to the complaint's allegations about his conduct and argued that the FTC's process was unfair.

[5] In a June 2020 joint submission to the OECD "describ[ing] antitrust analysis in the United States with

respect to so-called conglomerate effects of mergers," the FTC and DOJ stated that "[t]he 'entrenchment' doctrine . . . . is no longer viewed as valid under U.S. law or economic theory." Conglomerate Effects of Mergers – Note by the United States, OECD Directorate for Financial and Enterprise Affairs Competition Committee (June 10, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf.

[6] Ryan Quillian and John Kendrick, What Cos. Evaluating M&A Can Glean From Latest HSR Report, Law360 (Feb. 5, 2024), https://www.law360.com/articles/1793506/what-cos-evaluating-m-a-can-glean-from-latest-hsr-report.

[7] Concurring Statement of Commissioner Alvaro M. Bedoya, In the Matter of Exxon Mobil Corporation, FTC File No. 241-0004, (May 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneerambstmt_0.pdf.

[8] Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

[9] Assistant Attorney General Jonathan Kanter Delivers Remarks at the 2023 Georgetown Antitrust Law Symposium, (Sept. 19, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-2023-georgetown-antitrust.

[10] Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202, (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[11] Id.

[12] Covington Client Alert, FTC and DOJ Propose Sweeping Changes to the HSR Form, (Jun. 28, 2023), https://www.cov.com/en/news-and-insights/insights/2023/06/ftc-and-doj-propose-sweeping-changes-to-the-hsr-form#numberOfResults=12.

[13] Margaret Harding McGill, FTC's new stance: Litigate, don't negotiate, Axios (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan; Khushita Vasant, US DOJ to take measured, calculated litigation risks in bringing 'righteous' cases, Kanter says, mLex (June 20, 2022), https://content.mlex.com/#/content/1386776.

[14] Letter from Sen. Elizabeth Warren to Chair Lina Khan, et al. (Nov. 8, 2023)https://www.warren.senate.gov/imo/media/doc/2023.11.08%20Letter%20to%20FTC%20re%20Amgen%20Horizon%20Merger.pdf.

[15] Of course, the agencies have come to the settlement table during litigation, as happened in Amgen/Horizon (behavioral remedy) and as the merging parties are currently attempting in Kroger/Albertson's (divestiture).

[16] Analysis of Agreement Containing Consent Order to Aid Public Comment, In the Matter of Exxon Mobil Corporation, FTC File No. 241-0004, (May 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneeraapc_0.pdf.

[17] Concurring Statement of Commissioner Rebecca Kelly Slaughter, In the Matter of Exxon Mobil Corporation, FTC File No. 241-0004, (May 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonrksstmt_0.pdf.