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FTC Reasserts "Prior Approval" Policy for Future Acquisitions

The Federal Trade Commission has reasserted a policy previously abandoned in 1995 to seek to include "prior approval" obligations in merger consent decrees. Prior approval provisions require companies to seek the FTC's approval before closing certain future deals. Unlike merger reviews under the Hart-Scott-Rodino Act and Section 7 of the Clayton Act, an investigation pursuant to a prior approval obligation lacks any statutory timeframe or substantive standard governing whether the transaction will be cleared and when. Parties contemplating mergers likely to be subject to antitrust scrutiny should be mindful that consent decrees with the FTC may now directly restrict their ability to pursue future deals in the same or similar markets. The FTC vote to reinstate its prior approval policy was 3-2, with the Republican Commissioners issuing a strong dissent.

FTC Prior Approval Policy Statement

On July 21, 2021, the FTC rescinded a bipartisan 1995 prior approval policy by a 3-2 vote.[1] The 1995 policy had largely ended the use of prior approval provisions, except in certain limited circumstances.[2] In rescinding the policy, the FTC explained that the agency is "significantly under-resourced" and seeks to relieve the burden of reviewing "the same or similar deals in the same market" where the FTC has previously sought divestitures or challenged a transaction.

Last week, by another 3-2 vote, the FTC announced a new policy of "routinely" seeking prior approval provisions in merger consent decrees.[3] Under the new policy, the FTC will routinely seek to require parties subject to a consent order to "obtain prior approval from the FTC before closing *any* future transaction affecting each relevant market for which a violation was alleged," for a minimum of 10 years.[4] Under this policy, parties subject to the order would be required to seek prior approval both for HSR reportable transactions, as well as those that do not trigger filing obligations. The policy will also require divestiture buyers to seek prior FTC approval for future sale of the acquired assets. In addition, the FTC may seek to impose even "stronger relief" by requiring prior approval for deals outside of the relevant markets at issue in the transaction, based on the following factors:

- The nature of the transaction, in particular "whether the merging parties are attempting a transaction that is substantially similar to a transaction that was previously challenged by the Commission."[5]
- The level of market concentration.
- The degree to which the transaction increases concentration.

- The degree to which one of the parties likely had market power prior to the transaction.
- The parties' history of acquisitiveness, including "[w]hether either party to the transaction has a history of, or has indicated a desire to enter into, acquisitions in the same relevant market, in related markets (i.e., upstream or downstream firms), or in adjacent or complimentary products or geographic areas."
- Evidence of anticompetitive market dynamics post-transaction.

The new policy represents a sharp departure from FTC practice over the last 25 years, as well as the longstanding approach at the Department of Justice, which has announced no such policy change. As a result, the cost of settling with the FTC may no longer be limited to the divestiture of assets at issue in that transaction, but also ongoing limitations on future deals covered by the prior approval order.

Dissenting Statement

Calling the new policy "yet another gratuitous tax on M&A activity," Republican Commissioners Christine Wilson and Noah Phillips issued a dissent arguing that the policy is more aggressive than pre-1995 prior approval requirements, will chill M&A activity, and represents an attempt "to abrogate the HSR process."[6] Indeed, the policy statement provides that "[i]nvestigating the likely effects of a proposed merger under a prior approval provision is much different than a similar investigation under the strictures of the Hart-Scott-Rodino Act, where the merging parties can force a Commission decision to sue." In contrast, under a prior approval provision, "the FTC can simply say no."[7] Throughout their dissenting statement, the Commissioners pointed to the lack of substantive standards or defined scope in the new policy. In addition, the Commissioners criticized the procedure under which the Commission adopted the 2021 policy, where the deciding third vote was cast by a Democratic Commissioner before he left the agency to head the Consumer Financial Protection Bureau, but was not announced until weeks after he had departed the FTC.[8]

Recent Precedent

Notwithstanding these criticisms, simultaneous with the issuance of the new policy statement, the agency announced that the Commission had unanimously voted to approve a new merger consent decree—the first of Chair Lina Khan's four-month tenure—containing prior approval requirements.[9] The transaction involved the acquisition of 18 dialysis clinics, and was not subject to HSR reporting requirements. The FTC required the buyer to divest three clinics in Provo, Utah, and to seek prior approval from the FTC before acquiring any new ownership interest in a dialysis clinic anywhere in Utah for the next 10 years. In a concurring statement, Commissioner Wilson explained that she was "assess[ing] the propriety of the prior approval provision in this matter" based on the FTC's historic practices, not the new policy.[10]

Implications

Going forward, merging parties should include in their calculus for evaluating potential acquisitions the increased cost of entering into a consent decree with the FTC. Where a buyer contemplates acquiring additional businesses in the same or adjacent product and geographic markets, a prior approval obligation will shift the review of those transactions from the defined process and case law under the HSR Act and Section 7 of the Clayton Act to a review without an established timeline or substantive standard. In addition, the policy could make it more difficult for merging parties to find divestiture buyers willing to agree to restrict their future ability to sell the acquired assets through prior approval obligations. Even divestiture buyers that plan to own the assets indefinitely may be dissuaded if a prior approval policy

could restrict not only a discrete sale of the acquired assets, but other transactions as well, including a sale or merger of the company itself.

Whether parties will now agree to more prior approval obligations remains to be seen. As the dissent noted, parties may instead seek to resolve competitive issues themselves by carving out or selling assets without entering into a consent decree, thereby leaving the FTC the option to either "litigate the impact of the deal with the parties' solution incorporated"[11] or allow the deal to close. For some parties, however, certain narrowly tailored prior approval obligations may represent an acceptable condition of resolving FTC concerns. No matter their approach, businesses considering M&A activity should keep the FTC's new policy statement in mind when planning their deals.

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This alert is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions about the contents of this alert, please call your regular Fried Frank contact or the attorneys listed below:

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[1] Press Release, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter.

[2] These circumstances included where there was a "credible risk" that the parties would continue to pursue potentially anticompetitive mergers even after entering a consent order. *See* Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39,745 (Aug. 3, 1995).

[3] *See* Statement of the Commission on Use of Prior Approval Provisions in Merger Orders at 1 (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf [hereafter "2021 Policy Statement"].

[4] 2021 Policy Statement at 1.

[5] The statement provides that "[a] subsequent transaction is 'substantially similar' to a prior transaction if it includes some or all of the assets implicated in a prior transaction challenged by the Commission." 2021 Policy Statement at 2.

[6] *See generally* Dissenting Statement of Commissioners Christine S. Wilson & Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf [hereafter "Wilson & Phillips Dissent"].

[7] Press Release, FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive.

[8] Former Commissioner Rohit Chopra cast his "yes" vote before he departed the FTC to head the Consumer Financial Protection Bureau, but the Commission did not publish the policy until afterwards. This so-called "zombie vote" was critical in breaking what otherwise would have been a 2-2 deadlock. *See* Wilson & Phillips Dissent at 1.

[9] *See* Press Release, FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following.

[10] Concurring Statement of Commissioner Christine S. Wilson in the Matter of DaVita, Inc. and Total Renal Care, Inc. at 1 (Oct. 25, 2021), https://www.ftc.gov/public-statements/2021/10/concurring-statement-commissioner-christine-s-wilson-matter-davita-inc.

[11] Wilson & Phillips Dissent at 7.