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Preparing for new merger remedy practices at the FTC

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A sharply divided Federal Trade Commission issued a new policy statement on Oct. 25, 2021, imposing prior approval requirements for future deals in contested merger matters. Prior approval requirements prevent companies subject to a consent order from closing any proposed transaction affecting each relevant market alleged in a complaint – and potentially broader markets – for a minimum of 10 years without receiving prior approval from the FTC.

The policy change may have important implications for buyers and sellers that are considering divestiture commitments in purchase agreements to resolve potential antitrust issues with the FTC resulting from the proposed merger.

The new FTC prior approval policy applies to every company subject to a consent order and every company named in a complaint seeking to block a merger. The FTC also may consider a prior approval order for companies that abandon a transaction prior to the completion of an investigation or an FTC decision to challenge the proposed merger. Buyers of divested assets must also agree to similar prior approval conditions that apply to their decision to sell any of the acquired assets over the same period.

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The new prior approval policy replaces the less onerous prior notice requirement that had been in effect from 1995 until it was rescinded in July 2021 under the leadership of FTC Chair Lina Khan. Under the long-standing prior notice policy, the FTC had the burden to demonstrate that the proposed transaction was unlawful under the Clayton Act within the time frames of the Hart-Scott-Rodino Act.

Under the new prior approval requirement, companies now have the burden to demonstrate that their proposed merger is not anticompetitive. Notably, the FTC has not articulated any legal criteria for granting or denying prior approval.

Unlike the deadlines under the HSR Act, there is no statutory deadline for when the FTC must decide to grant or deny prior approval. As Christine Wilson and Noah Phillips, the two dissenting FTC commissioners, note, "[P]rior approval flips the burden of proof on its head by placing it on the merging parties rather than on the government.... The FTC can take as long as it likes." (https://bit.ly/31TuXPV) The FTC can effectively block any proposed merger subject to a prior approval requirement by simply not approving it.

The FTC states that the imposition of at least a 10-year prior approval requirement is intended to prevent proposed "facially anticompetitive deals," especially by companies with "a long-term strategy that contemplates other acquisitions down the road." (https://bit.ly/31QfrV4)

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The FTC also states that companies "should now know that they are at risk of being subject to a prior approval provision." Prior approval requirements are also intended to preserve scarce resources so that the FTC does not have to re-investigate the same or similar transactions and to enable the FTC to detect and prevent anticompetitive deals that are not reportable under the HSR Act.

Since the prior approval policy became effective in October, the FTC has brought three merger enforcement actions resulting in consent orders. The consent orders for these mergers — involving dialysis clinics, generic drugs, and supermarkets — contain a 10-year prior approval requirement that extends beyond the alleged relevant markets. In each of these matters the buyers of the divested assets are also subject to a prior approval requirement that imposes certain restrictions of their ability to sell the acquired assets for 10 years.

Based on another recent merger investigation, it is unclear when the FTC may impose a prior approval requirement if the parties terminate a merger agreement prior to a formal enforcement action. On Dec. 3, 2021, the FTC announced that Great Outdoors Group, the owner of Cabela's and Bass Pro, abandoned its agreement to acquire competitor Sportsman's Warehouse after an 11-month investigation. The FTC, however, did not require Great Outdoors to obtain prior approval for the same or a similar acquisition in the market for specialty outdoor goods retailers.

The new prior approval policy has important implications for how companies may approach deal making, especially for companies in fragmented sectors with opportunities for growth through M&A that are pursuing a roll-up strategy of acquiring additional companies in the same industry. The new policy may impact the sequencing of deals. It may be an advantage to undertake a large deal initially when the company is handcuffed with a prior approval requirement. If starting with an antitrust-sensitive small deal, it may be harder to get the larger, more valuable deal done later.

In negotiating purchase agreements, buyers may need to seek limitations that will enable them to not enter consent agreements with prior approval provisions significantly beyond the product and geographic markets alleged in a complaint. Buyers may also need provisions that enable them to terminate a deal prior to the completion of an investigation to avoid any prior approval requirement for future deals in the same industry. Similarly, sellers may also want to add specific provisions in purchase agreements requiring buyers to enter into consent agreements that require prior approval provisions to ensure that a buyer cannot walk away from a consent agreement that would otherwise resolve any competitive issues with the FTC.

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