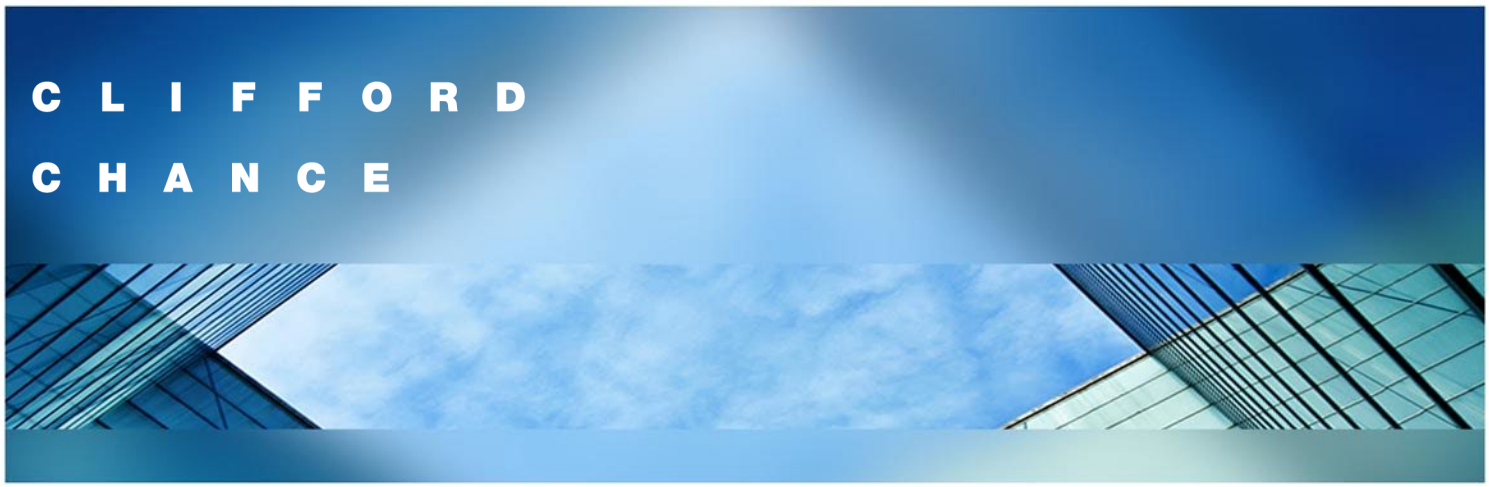

FTC'S REINSTATEMENT OF PRIOR APPROVAL – THE NEXT STEP FORWARD FOR THE FTC AS IT BRUSHES OFF AN OLD TOOL

The Federal Trade Commission ("FTC") recently reinstated a decades-old policy requiring acquiring parties subject to an FTC merger enforcement order (i.e., consent decree) to obtain prior approval for any future transaction for at least 10 years ("Prior Approval Policy"). This Prior Approval Policy applies to any future transaction by the acquiring party irrespective of whether the thresholds of the Hart-Scott-Rodino Act ("HSR Act") are met. The approval requirement applies to any future deals involving similar markets to those in the original transaction, although in some cases the FTC may require notification of broader transactions. The FTC noted that it may even apply the Prior Approval Policy in transactions where parties abandon transactions after the FTC has filed a complaint to block the deal. The new policy represents one of several recent measures by the FTC that demonstrates its increasing scrutiny of mergers and conduct it believes to be anticompetitive and its efforts to deter companies from entering into anticompetitive mergers.

On October 25, 2021, the FTC announced it was reinstating a decades-old prior approval policy that it had not applied since 1995. The Prior Approval Policy puts merging parties that are subject to an FTC order under increased scrutiny. It consists of three major components:

First, the FTC declared its intent to now "routinely" include prior approval provisions “in all merger divestiture orders for every relevant market where harm is alleged to occur, for a minimum of ten years.”[1] Prior approval provisions will be applicable to any future transaction of the merging parties regardless of whether the usual HSR Act thresholds are met. The FTC declared that it would be less

[1] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders, Fed. Trade Comm’n, Oct. 25, 2021, at 1.

likely to pursue such a provision against merging parties that abandoned their transaction prior to certifying substantial compliance with a Second Request (or civil investigatory demand or subpoena for deals not reportable under the HSR Act). The FTC notes that this "should signal to parties that it is more beneficial to them to abandon an anticompetitive transaction before the Commission staff has to expend significant resources investigating the matter."[2] However, even where parties have abandoned a transaction, the FTC clarifies that it may nonetheless pursue a prior approval order on a case-by-case basis.

Second, the FTC cautioned that it may pursue a broader prior approval order where "stronger relief is needed."[3] In particular, the FTC may seek a prior approval provision that covers markets beyond the relevant markets affected by the initial merger requiring the consent order. When deciding the length and breadth of such a prior approval order, the FTC will take a holistic view, considering factors such as the "nature of the transaction," 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 pre-merger," the parties' "history of acquisitiveness," and "evidence of anticompetitive market dynamics."[4]

Finally, the FTC declared that all buyers of divested assets will be subject to a prior approval order, and thus will be required to obtain prior approval for any future sale of the divested assets for a minimum of 10 years. The rule is intended to ensure that the divested assets are not sold to an unsuitable acquirer whose purchase of the assets would contravene the purpose of the divestiture order.

The FTC's policy before the reinstatement of the Prior Approval Policy limited prior notice and approval requirements to certain circumstances: (1) A prior-*approval* provision was imposed only where there was a "credible risk" that the company "would, but for the provision, attempt the same or approximately the same merger" (such as a repurchase of divested assets); and (2) a prior-*notification* provision was imposed only in cases where there was a "credible risk" that the company "would, but for an order, engage in an otherwise unreportable anticompetitive merger."[5] The reinstatement of the Prior Approval Policy not only erases this distinction, it also significantly lowers the standard for when a prior approval provision can be imposed.

In announcing the Prior Approval Policy, the FTC made clear its intent to chill transactions that "should have died in the boardroom" and to prevent any facially anticompetitive deals of "acquisitive firms" that are "too willing to roll the dice on an anticompetitive deal."[6] The statement also cited the need to reduce the burdens on the FTC's resources and staff by ensuring that the agency, after having determined that a transaction would be problematic, would not have to review the same or a similar transaction again.

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2 *Id* at 2.
3 *Id* at 2.
4 *Id* at 2-3.
5 Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39,745, 39476 (Aug. 3, 1995).
6 *Id* at 1.

The same day the FTC announced the reinstatement of the Prior Approval Policy, it issued a proposed order applying the Prior Approval Policy in a case against DaVita, Inc. ("DaVita"), a dialysis service provider. The FTC alleges that DaVita's proposed acquisition of the University of Utah Health's dialysis clinics would reduce competition in vital outpatient dialysis services. In addition to other provisions, the FTC's proposed order would require DaVita to receive prior approval from the FTC before acquiring any new ownership interest in a dialysis clinic in the state of Utah for a period of ten years. The FTC emphasized that this prior approval requirement extended beyond the markets directly impacted by the merger; while the FTC's original complaint argued only that the merger threatened competition in the greater Provo, Utah area, the proposed order covered the entire state of Utah. DaVita has been described by the FTC as a company that has a history of pursuing consolidation in life-saving health industries. The FTC's announcement stated that the order will help to quickly identify and ultimately prevent future facially anticompetitive deals by DaVita. The FTC's vote to accept the proposed consent order for public comment was 5-0.

The decision to reinstate the Prior Approval Policy passed by a 3-2 vote, with Commissioners Phillips and Wilson dissenting. In a statement concurring with the decision, Chair Lina M. Khan stated that the HSR Act was an insufficient safeguard by itself and should act as "a complement to, not a substitute for, a prior approval and prior notice policy."[7] In dissent, Commissioner Wilson expressed concern that adding these provisions to orders as a regular practice would penalize firms for merely attempting to "exercise [their] legal rights and litigate" against a challenge by the Commission, and would "facilitate a massive end-run around" the HSR Act.[8] Commissioner Phillips also noted that the Prior Approval Policy could act as a "decade-long M&A tax on anyone who enters into a merger consent," and would make the HSR Act process less efficient by deterring companies from working with the Commission to resolve competitive concerns.[9] Both Commissioners predicted that the new policy, by adding costs and uncertainty to the merger review process, would chill procompetitive deals and harm consumers.

At a time where the FTC is reviewing a record number of HSR Act filings and is litigating a number of high-profile cases with limited resources, the FTC views the Prior Approval Policy as a useful deterrent in its toolbox.

Key Takeaways

- Out of 17 consent orders addressing anticompetitive conduct that were either agreed upon or finalized in 2020, seven orders included prior notice provisions and one order included a prior approval provision. Applying the Prior Approval Policy, and routinely issuing prior approval orders to merging parties and divested asset acquirers, will dramatically increase these numbers.

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7 Remarks of Chair Lina M. Khan Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions, Jul. 21, 2021.

8 See Statement of Commissioner Christine S. Wilson, Dissenting Statement Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases.

9 See Statement of Commissioner Noah Joshua Phillips, Dissenting Statement Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases.

- The factors the FTC will weigh in assessing the severity of the Prior Approval Policy application raises questions as to whether certain industries will be more adversely affected. For example, having a broad prior approval provision levied on a private equity company or activist investor could be a death knell for those entities.
- Given concerns that antitrust agencies and others have raised about anticompetitive mergers that are not covered by the HSR Act thresholds, the reinstated Prior Approval Policy provides an opportunity for the FTC to bypass the Clayton Act and HSR Act and target transactions that it believes are anticompetitive, particularly if they are being conducted by a relatively small number of companies.
- The Prior Approval Policy puts more pressure on parties contemplating a transaction that may raise antitrust risks, particularly if the deal is likely to be reviewed by the FTC as opposed to the DOJ. The DOJ has not (at least yet) implemented a similar policy, and this change in policy is not intended to change the clearance process between the antitrust agencies.
- The Prior Approval Policy may require an update of internal compliance rules, especially when a company may be subject to a prior approval requirement and intends to make acquisitions that fall below the HSR Act thresholds.

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