

Buyer Beware: The FTC's Revived and Expanded Prior Approval Policy

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In another divergence in practice between the Federal Trade Commission (the “FTC”) and the U.S. Department of Justice Antitrust Division (“DOJ Antitrust”), the FTC in late October announced along party lines (3-2) a new Prior Approval Policy Statement that revives and expands the FTC’s pre-1995 practice of restricting future acquisitions by companies that pursue mergers that the FTC has deemed anticompetitive. Going forward, the FTC intends to include prior approval provisions in all consent orders, effectively requiring the merging parties to FTC-contested acquisitions to seek the FTC’s approval for at least 10 years before closing any future transaction affecting the relevant market for which a violation was alleged (and in some cases, broader markets). In addition, the FTC will require all divestiture buyers to obtain the FTC’s approval before they can sell divested assets for at least 10 years following the purchase. Parties contemplating mergers likely to be subject to FTC scrutiny should be mindful that they may be restricted on a going-forward basis from pursuing future deals. And potential divestiture buyers, in particular private equity firms, should give close attention to this new FTC approval right when reviewing the purchase of divested assets.

Pre-1995 Practice and the 1995 Policy Statement. If the U.S. antitrust agencies believe that a proposed transaction violates the antitrust laws, the merging parties may remedy that transaction by agreeing to divest assets through a consent decree. Before 1995, FTC consent decrees regularly required the merging parties to obtain prior approval from the FTC during the period of the consent (capped at 10 years) for Hart-Scott-Rodino (“HSR”) reportable future transactions that involved the same product and geographic market. In addition, the consents often included “prior notice” provisions that require the merging parties to report to the FTC those deals that fell below the HSR reporting thresholds.

In 1995, the FTC issued a Policy Statement on Prior Notice and Approval, effectively abandoning that pre-1995 practice of prior approval as a matter of routine. As explained in the 1995 Policy Statement:

Although prior approval requirements in some cases may save the Commission the costs of re-litigating issues that already have been resolved, prior approval provisions also may impose costs on a company subject to such a requirement. Moreover, the HSR Act has proven to be an effective means of

investigating and challenging most anticompetitive transactions before they occur. Consequently, the Commission has concluded that a general policy of requiring prior approval is no longer needed.

New Measures in 2021. The current Commission has a more cynical view of the HSR Act's effectiveness than the 1995 Commission did. As Chair Lina Khan wrote in her September 22, 2021 Memorandum to Commission Staff and Commissioners Regarding the Vision and Priorities for the FTC, “[w]e need to find ways to deter unlawful transactions. The rate at which firms propose facially illegal deals heavily strains agency resources and compromises our ability to investigate significant mergers, raising the risk of false negatives.”

In July 2021, the FTC voted on party lines to rescind the 1995 Policy Statement. In the accompanying press release, the Commission explained that “reversing the misconceived 1995 policy will stop repeat offenders—and the illegal mergers they propose that siphon resources and staff—while preserving competition in the markets.”

The October 2021 Policy Statement is noteworthy for its stark departure from the last 25 years of FTC practice and expansion beyond the long-abandoned pre-1995 practices. Under this policy, all buyers of divestiture assets subject to an FTC consent must seek prior FTC approval for the future sale of those assets. Also, 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. These requirements apply whether or not the future transaction is HSR reportable. And the FTC may seek to impose “stronger relief” by requiring merging parties to seek prior approval for deals outside of the relevant markets at issue in the transaction based on a series of non-exhaustive factors, including but not limited to whether the transaction is “substantially similar to a transaction that was previously challenged by the Commission—even if the prior matter was not litigated” and whether 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.”¹

The October 2021 Prior Approval Policy also seeks to encourage merging parties to abandon potentially problematic transactions earlier in the FTC's investigation. If the merging parties abandon their transaction prior to their certification of substantial

¹ The other non-exhaustive factors listed by the FTC include: (a) the level of existing market concentration; (b) how much the transaction increases market concentration; (c) the degree to which one of the parties, pre-merger, had market power; and (d) the presence of market characteristics that “create an ability or incentive for anticompetitive market dynamics post-transaction.”

compliance with the Second Request, “[t]he Commission is less likely to pursue a prior approval provision.” But if the merging parties abandon their transaction after the Commission files suit to block the deal that “does not guarantee that the Commission will not subsequently pursue an order incorporating a prior approval provision.” The stated rationale is to prevent the FTC from “expend[ing] significant resources investigating the matter.”

The Dissent. Commissioners Wilson and Phillips vigorously dissented from the October 2021 Prior Approval Policy Statement. The dissent writes that overall, “[t]he 2021 Policy Statement represents yet another daft attempt by a partisan majority of commissioners to use bureaucratic red tape to weigh[] down all transactions—not just potentially anticompetitive ones—and to chill M&A activity in the United States.” With regard specifically to the extension of the policy statement to divestiture buyers, the dissent continues that “[t]he Commission is thus raising the cost of solving problems for the purpose of stopping deals it has no reason to believe are illegal. That is bonkers crazy.” And with regard to the Policy’s incentives for parties to abandon their deal before substantial compliance, the dissent deadpans, “God forbid we should do our job of analyzing deals notified pursuant to the HSR Act.”

Implications. Along with increased antitrust enforcement efforts and merger scrutiny generally, the implications of the October 2021 Prior Approval Policy Statement include:

- Divergent treatment for companies whose mergers are reviewed by the FTC instead of DOJ Antitrust. Because DOJ Antitrust has not adopted a prior approval policy, merging companies and divestiture buyers may face differing settlement obligations depending on which agency reviews their transaction.
- Difficulty finding and increased risk for divestiture buyers. Companies may be wary of having to keep the assets for a minimum of 10 years if the FTC does not approve their future sale. This is a particular risk for private equity firms and their exit plans for a carve-out business or assets, particularly in an environment where the Commission appears hostile to private equity.
- Increased risks and potential costs for strategic buyers as strategic combinations may result in the FTC demanding a consent with a prior approval provision. If a company contemplates acquiring additional businesses in the future (even those in different industries), being subject to a prior approval obligation will shift the review of those transactions from the statutorily defined and time-limited process and case law under the HSR Act and Section 7 of the Clayton Act to a review without a statutory timeline or substantive standard of review. A prior approval obligation may give the FTC an effective veto over the company’s acquisition strategy for a decade or more.

- Increased closing uncertainty for buyers subject to a prior approval obligation, potentially significantly disadvantaging that buyer in future bidding situations. Transactions subject to prior approval have no statutory deadline for the FTC to complete its review, and the FTC can block the deal without having to litigate its merits. This risk may lead to sellers selecting alternative bidders and/or may drive down the purchase price.
- Sellers choosing to “fix-it-first” by selling off or shuttering the overlapping competitive assets before submitting an HSR filing.
- Parties choosing to abandon a transaction upon the receipt from the FTC of a Second Request in order to limit the risk of being subject to a prior consent order.
- Lengthy litigation after parties abandon transactions post-compliance with the Second Request as the FTC seeks to impose prior approval obligations. Given the unlikelihood that the parties to an abandoned transaction will voluntarily submit to an order that requires prior FTC approval for future transactions, the FTC’s alternative is to sue on the abandoned transaction to obtain the consent via a court order. As the dissent explains, “[w]e have seen this movie before, when the FTC litigated for nearly nine years to obtain a prior approval provision from Coca-Cola . . . prompt[ing the] adoption of the 1995 Policy Statement in the first place.”

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