November 3, 2021

A Divided FTC Adopts "Prior Approval" Policy

Last week, the Federal Trade Commission announced a new policy requiring firms that notify mergers the FTC deems anticompetitive to obtain "prior approval" for all future acquisitions affecting the same or related relevant markets. The Commission's decision split along party lines, with the Democratic majority relying on the vote of a former Commissioner who left the agency two weeks earlier. The FTC announced its new policy without notice to Republican Commissioners Phillips and Wilson, who later issued a dissenting statement. The announcement is the latest in a series of FTC measures focused on merger activity, which include the blanket suspension of early terminations of the HSR Act waiting period, "warning letters" to parties upon expirations of the HSR waiting period, elimination of certain informal HSR interpretations by the Premerger Notification Office, withdrawal of the vertical merger guidelines, and plans to revise the horizontal merger guidelines.

Under the new policy, proposed FTC consent orders will require merging parties to obtain the agency's prior permission to close any future acquisition in an affected market for at least ten years. Where "stronger relief is needed," the FTC may also seek to impose prior approval obligations covering additional markets beyond those affected by a merger. The agency will consider a number of factors in determining the duration and breadth of prior approval provisions, including whether the transaction under review is substantially similar to a transaction that was previously challenged by the FTC and the parties' "history of acquisitiveness." Last week's announcement coincided with the agency's acceptance of a consent decree in DaVita/Total Renal Care, which included a statewide prior approval provision extending beyond the geographic markets allegedly impacted by the transaction. The new policy diverges from settlement practice at the Justice Department's Antitrust Division, which shares merger review authority with the FTC but has made no similar announcement.

The FTC's prior approval regime would apply to all subsequent acquisitions in designated markets, whether or not independently reportable under the HSR Act, and investigations would not be subject to the normal HSR process. This has important timing and procedural implications, as prior approval reviews would not be subject to the HSR Act's statutory timeframes, giving buyers no control of timing in open-ended investigations. More significant, prior approval eliminates the Commission's burden of proof and confers on it discretion to approve or disapprove a deal, regardless of value. As the agency's press release notes, "the FTC can simply say no."

While the new FTC policy speaks of "requiring" prior approval provisions in all future orders, the Commission lacks the authority to impose them unilaterally. Rather, merging parties must *agree* to be subject to such obligations in a negotiated consent order. Given that prior approval could create significant burdens on a firm's ability to complete future M&A deals—and consequently reduce its viability and attractiveness as a buyer—the new policy will discourage some merging parties from resolving competitive concerns through settlement, likely resulting in more litigated cases. In particular, if merging parties can structure a viable remedy unilaterally, the policy may give them a greater incentive to "litigate the fix" and seek to

persuade a federal court that the remedy adequately addresses any competitive issues. A policy whose stated intent is to preserve the FTC's scarce resources may have the opposite result, limiting the agency's ability to resolve mergers through settlements and forcing it to devote more resources to injunctive litigation.

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