Updates
October 29, 2021

FTC Revives and Expands “Prior Approval” Policy

On October 25, 2021, the U.S. Federal Trade Commission (FTC) released its "Statement on Use of Prior Approval Provisions in Merger Orders" (the Statement). The Statement announces two material changes in the agency's merger enforcement program. First, it requires parties who agree to divest assets or otherwise remedy a challenged acquisition also to get prior approval from the FTC before "closing any future transaction affecting each relevant market for which a violation was alleged." This "prior approval" provision in practical effect shifts the burden of proof from the agency to the merging parties to establish the lawfulness of future deals. Thus, buyers planning to acquire several firms in the same product market may find their plans blocked if any of the early deals are challenged.

Second, the Statement reserves, to the agency, the right to obtain a "prior approval" order where the parties to a challenged deal have, instead of agreeing to a remedy, simply abandoned the deal. Moreover, the agency may seek a "prior approval" order if the parties abandon the deal even before the agency has issued a complaint. It is unclear whether the agency has statutory authority to pursue "prior approval" remedies against the parties to abandoned deals. The agency seems intent on establishing such precedent.

Taken together, these policies will complicate settlement negotiations between merging parties and the agency during investigations, likely leading to many deals being abandoned early in the investigation process.

Background

Prior to 1995, the FTC required all companies that had violated the law in a previous merger to obtain prior approval by the FTC for any future transaction in at least the same product and geographic market for which a violation was alleged. In 1995, the FTC removed this requirement in its 1995 "Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases" (1995 Statement) on the basis that the Hart-Scott-Rodino (HSR) premerger notification process would allow for a similar review, which would have then duplicated the FTC's efforts.

On July 21, 2021, the FTC voted to rescind the 1995 Statement at an open meeting. In her remarks supporting this rescission, FTC Chair Linda Khan noted that "Without a prior approval provision, the Commission must initiate a whole new investigation and then go into court to block the deal anew. This additional burden drains the already strapped resources of the Commission." Commissioner Christine S. Wilson, voting against the rescission, noted that the 1995 Statement "did not eliminate the use of prior approval and prior notice provisions in merger cases," and allowed the FTC to use such a provision "where there is a credible risk that a company would attempt the same or approximately the same merger already reviewed by the agency." She also noted that in 2020, there were seven FTC orders that included prior notice provisions, and one order that included a prior approval provision. However, the FTC's recent Statement looks to "routinely" implement prior approval or notice provisions in FTC orders, and broadens the FTC's powers by reserving the FTC's right to seek such a provision even when the deal is abandoned.

The Statement continues to lay the groundwork for FTC's active enforcement role, as the FTC prioritizes concentrated markets and monopolistic behavior. However, the revival of such a policy will lead to uncertainty in the transactional space, as it will affect negotiations between parties concerning the antitrust provisions in

merger agreements. Additionally, the U.S. Department of Justice (DOJ) has stayed silent on the revival of the FTC's prior approval provision, creating a divergence in federal antitrust policy in the merger context.

"Prior Approval" Provision Determined by Timely Abandonment of Anticompetitive Deal

The FTC first notes that it will return to its prior practice of including prior approval provisions in all merger divestiture orders for "every relevant market where harm is alleged to occur, for a minimum of ten years." Additionally, the FTC will require buyers of divested assets to obtain prior approval for any future sale of the divested assets for a minimum of 10 years.

Second, the FTC reserves the right to seek a "prior approval" order even if parties to a challenged transaction abandon the deal. The Statement indicates that the timing of the parties' abandonment of the deal will determine whether a prior approval order is sought by the FTC:

- **Abandonment of Deal Prior to Substantial Compliance With Second Request, Civil Investigative Demand, or Subpoena *Duces Tecum*.** The FTC notes that it is "less likely to pursue a prior approval provision" if parties abandon their transaction prior to certifying substantial compliance with the Second Request, or, in the context of non-HSR reportable deals, prior to substantially complying with a Civil Investigative Demand or Subpoena *Duces Tecum*. The FTC warns 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."
- **Abandonment of Deal When FTC Issues Complaint.** The Statement indicates that parties risk a broader prior approval provision when they abandon an anticompetitive deal after litigation commences. In situations where "stronger relief is needed," the FTC may expand the prior approval provision to additional products and geographic markets not relevant to the actual merger. This decision will be based on the following factors: (1) whether the at-issue transaction includes all or some of the assets in a prior merger challenged by the FTC, (2) the level of concentration in the market over the previous decade, (3) whether the transaction would "significantly" increase concentration, (4) the merging parties' individual market power, (5) whether the merging parties have a history of transactions in complementary or related markets, and (6) whether "market characteristics" would incentivize anticompetitive behavior post-transaction.

FTC Includes "Prior Approval" Policy in New Order

On October 25, 2021, the FTC also issued its first order with a prior approval provision after the publication of the FTC's Statement. The order alleges that a dialysis service provider's proposed acquisition in the Provo, Utah market of a clinic would further reduce competition. The dialysis service provider was not only ordered to divest certain clinics, but also had to accept a prior approval provision. The prior approval provision requires that the dialysis service provider cannot, without prior approval from the FTC, engage in the following transactions: (1) acquire any ownership or leasehold interest in any facility that has operated as a dialysis clinic six months prior to a proposed acquisition, (2) acquire any ownership in any business that owns interest in a dialysis clinic in Utah, and (3) enter into any contracts allowing the dialysis service provider to participate in the business of any dialysis clinic in Utah. The prior approval section noted some exceptions, and did not require prior approval if the dialysis service provider independently constructed or opened new facilities or acquired businesses that operated clinics in Utah and other states. The order limited the prior approval provision to strictly clinics operating within Utah. Interestingly, the FTC's order did not expand the prior approval provision to geographic markets outside of Utah or products other than dialysis clinics. The FTC voted to accept the order for public comment.

Key Takeaways

The revived "prior approval" policy markedly increases the stakes in merger review poker. While there will be increased antitrust risk for both buyers and sellers, the emphasis will be on the buyers. In addition to accepting possible divestitures, buyers may now also have to accept new antitrust provisions in merger agreements, such as the obligation to accept an FTC prior approval provision. By making settlements more difficult, the FTC's policy will likely lead to some increase in the number of litigated deals, but a substantially larger number of abandoned deals.

Authors

Caroline G. Tunca

Counsel
CTunca@perkinscoie.com 312.324.8595

Explore more in

Antitrust & Unfair Competition Mergers & Acquisitions Consumer Protection

Related insights

Update

‘Tis the Season… for Cybercriminals: A Holiday Reminder for Retailers

Update

Employers and Immigration Under Trump: What You Need To Know