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FTC's New Prior Approval Policy Affects Merging Parties and Buyers of Divested Assets

Authored by Benjamin C. Jensen, Leslie J. Levinson, and Danielle H. Tangorre

Effective October 25, 2021, the Federal Trade Commission (FTC) has adopted a new policy providing increased scrutiny of merger and acquisition activity for potential anti-competitive effects. The new policy applies to consent orders that merging firms enter into with the FTC to resolve investigations concerning competition in a relevant antitrust market that require the divestiture of certain assets.

Under the new policy, all such consent orders must now include provisions requiring the merging firm to seek prior approval of all future acquisitions affecting each relevant market for which a violation was alleged for a minimum of ten years. In addition, firms that acquire divested assets must also seek prior approval for any future sale of those assets for a minimum of ten years. In practice, the FTC's new policy means that both the sellers and buyers of divested assets under FTC consent orders will need to petition for prior approval and will shoulder the burden of proving the absence of anti-competitive effects for a potentially broad range of future transactions. While framed as a return to the agency's routine practice prior to a 1995 policy statement, the dissenting statement from two Commissioners slammed the new policy as an end-run around Hart-Scott-Rodino (HSR) Act procedures, asserting that it will significantly burden future merger and acquisition policy.

The FTC's October 25 announcement follows an earlier action in July 2021 rescinding the Commission's 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions. Under the 1995 Policy Statement, the FTC announced it would no longer routinely require prior approval of future acquisitions in consent orders entered in merger cases, but rather only require it when there was a "credible risk" of reoccurrence. Instead, the FTC's policy was to rely on pre-merger notification requirements under the HSR Act as the principal means of assessing mergers proposed by such companies.[1]

With the 1995 Policy Statement rescinded, the FTC's 2021 Policy Statement on Use of Prior Approval Provisions in Merger Orders contains four key components that stand to significantly affect future FTC oversight of proposed mergers and acquisitions.

1. ***Prior Approval Provisions in All Consent Orders:*** Going forward, the FTC will require that all merger divestiture orders include provisions requiring merging parties to seek prior approval for future transactions for every relevant market for which a violation was alleged for a minimum time period of 10 years.
2. ***Incentivizing Parties to Abandon Transactions Early in the Investigative Process:*** For parties looking to avoid being saddled with the need to seek prior approval for future transactions, the FTC encourages parties to abandon transactions before the FTC has to devote substantial resources to assessing the proposed merger. Under the Policy, parties that abandon their transactions prior to certifying substantial compliance with a Second Request will be "less likely" to face prior approval transactions from the FTC. Conversely, in instances for which the FTC issues a complaint to block a transaction, even parties that ultimately abandon their transaction may still face prior approval provisions for future transactions.

3. ***Broader Prior Approval Provisions:*** In situations in which "stronger relief is needed," the FTC announced that it may seek prior approval provisions against merging parties that cover product and geographic markets that go beyond the relevant markets affected by the merger.
4. ***Divestiture Buyers Subject to Prior Approval Obligations:*** In addition to impacts on merging parties, buyers of divested assets in merger consent orders will be required to agree to submit for prior approval for any future sale of the assets they acquire in divestiture orders for a minimum of 10 years.

The FTC's stated motivations for its new prior approval policy include discouraging parties from pursuing deals with potential anticompetitive effects and preserving FTC resources by conducting merger review outside the relatively short timeframes required under the HSR Act. A key focus of the new policy statement appears to be targeting what the Commission has deemed "repeat offenders," i.e., those entities that continue to propose allegedly illegal mergers, including ones that had been previously litigated and won by the FTC,[2] or companies buying back previously ordered divesture assets.[3] As to the latter, the majority of the Commissioners believe this brings the FTC in line with the Department of Justice, which "routinely bars merging parties from reacquiring assets ordered to be divested."[4] Commissioner Chopra noted that the rescission of the 1995 Policy Statement and pre-merger review returns a "key tool for the Commission to combat illegal merger activity" by discouraging repeat offenders and prohibiting merging parties from reacquiring assets that they have been required to divest.[5] Acknowledging that reviews under the HSR Act can force the agency to sue and incur significant expenditures of costs and resources, the FTC Policy Statement emphasizes that conducting merger review following a petition for prior approval will avoid the "brinkmanship" associated with HSR reviews.

In a sharply-worded dissenting statement, Commissioners Christine S. Wilson and Noah Joshua Phillips (Dissenting Commissioners) accused the majority of using "bureaucratic red tape to weight down all transactions … and to chill M&A activity in the United States."[6] The Dissenting Commissioners dispute the majority's contention that the 2021 Policy Statement restores practices in effect prior to 1995. Instead, the Dissenting Commissioners contend the 2021 Policy goes well beyond the pre-1995 status quo, in that the FTC now has established a ***floor*** of ten years for prior approval provisions in consent orders as compared to a ***ceiling*** of ten years prior to 1995 and extends such provisions to innocent buyers of divested assets.[7] The Dissenting Commissioners also disagree with the repeat offender rationale, noting rather, that the policy affects non-parties in requiring them also to seek prior approval for any future sales. This impact, the Dissenting Commissioners believe, is a deterrent for parties to step in and help the government resolve a competitive issue by acquiring divested assets. Further, by circumventing the pre-merger notification procedures under the HSR Act, the dissenting statement contends that the FTC has effectively abrogated the HSR review process passed by Congress. The Dissenting Commissioners conclude with the prediction that the FTC's 2021 Policy will cause more harm and actually increase the burden on the agency, as parties will be less likely to resolve merger matters through consent agreements, and the incentives to work with the government to take action to limit potential anti-competitive effects through divestiture are drastically undercut by the minimum ten-year prior approval requirement for future transactions.

The FTC's new policy requiring prior approval for future transactions in divestiture orders appears likely to significantly chill the willingness of parties to consent to divestiture of assets as a means to obtain approval for challenged mergers. The minimum of ten years is also an interesting choice, and one that is far longer than has historically been imposed by the FTC. Beyond the burdens on future transactions, the willingness of buyers (often private equity funds) to accept divested assets subject to prior approval restrictions will surely be tested.

FOR MORE INFORMATION

For more information contact any of the authors listed below:

Benjamin C. Jensen | Leslie J. Levinson | Danielle H. Tangorre

ENDNOTES

[1] Under the HSR Act, notice of proposed mergers and acquisitions meeting certain thresholds (generally, transactions in excess of $92 million) must be provided to the FTC and Department of Justice. Following submission of the pre-merger notification, parties must usually wait 30 days (absent the granting of an early termination) before completing the transaction while the FTC (or DOJ) assesses

potential anti-competitive effects. If either agency determines further inquiry is necessary, it may request additional information from the parties – known as a "Second Request."

[2] Prepared Remarks of Commissioner Rohit Chopra Regarding the Motion to Rescind the Commission's 1995 Policy Statement on Prior Approval and Prior Notice, July 21, 2021, available here.

[3] Remarks of Chair Lina M. Khan Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions, July 21, 2021, available here.

[4] Id. at 3.

[5] Prepared Remarks of Commissioner Rohit Chopra Regarding the Motion to Rescind the Commission's 1995 Policy Statement on Prior Approval and Prior Notice, July 21, 2021, available here.

[6] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on the Use of Prior Approval Provisions in Merger Orders, October 29, 2021, available here.

[7] Ibid.