Alert

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FTC Makes Major Changes to Expand Prior Approval in Merger Consents, Creating Greater Risk for Merging Parties Subject to FTC Merger Review

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On Monday, October 25, the Federal Trade Commission (FTC or "Commission") issued a policy statement announcing that the Commission will require all parties that enter into a merger consent agreement to agree that the parties will for at least ten years seek and obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged. Unlike reviews under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") that provide a statutory timeline for U.S. antitrust agency review of proposed transactions and thus some timing certainty for merging parties, the prior approval provisions anticipated by the FTC will have no statutory or other timeline for transactions to receive prior approval. Thus, any company with a transaction subject to prior approval will face much greater timing uncertainty.

The FTC policy statement also states that the FTC may require companies entering into merger consent orders to agree to a prior approval provision that covers product and geographic markets beyond those impacted by the merger. When making such determinations of additional relief in the future, the Commission's policy statement indicates that the agency will consider several factors, including (1) the nature of the transaction; (2) the level of market concentration; (3) the degree to which the transaction increases concentration; (4) the degree to which one of the parties had market power pre-acquisition; (5) the parties' history of acquisitiveness; and (6) evidence of anticompetitive market dynamics.

Further, in the policy statement, the FTC announced it will require buyers of divested assets subject to a merger consent order to agree to seek prior approval of any future sale of those assets for a minimum of ten years. This will discourage some divestiture buyers and likely will decrease the value of divested assets. Finally, the Commission policy statement stated that in cases in which the Commission issues a complaint and the parties subsequently abandon the transaction, the agency will make a case-specific determination as to whether it will pursue a prior approval order. This would require a court order or party agreement.

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The Antitrust Division of the Department of Justice (DOJ) did not join the FTC's announcement on its prior approval policy, creating an additional area of divergence between the DOJ's and FTC's merger review policies and practices—a divergence that could have a significant impact on transactions.

What This Means for Companies Considering Mergers

If the FTC is likely to be the antitrust agency reviewing the transaction, companies considering a merger or acquisition should carefully assess the risk of the Commission requiring a consent order to fix a competitive problem and the companies' willingness to accept the prior approval provisions that the FTC will demand. If you are likely to enter into a consent order, anticipate that the costs and time associated with getting regulatory approval of the transaction will be increased. Moreover, agreeing to the prior approval provisions will have a long term impact on the time and expense associated with future transactions.

For parties with transactions that largely present no competitive issues but may have a distinct product or geographic competitive issue, merging parties may want to sign a definitive divestiture agreement prior to completing an HSR filing to create a "fix it first," allowing them to present the FTC with a transaction that does not have a competitive overlap or other issue. Additionally, for transactions that likely will be reviewed by the FTC that could have a competitive issue fixable through a remedy, parties may want to ensure that any merger agreement builds in time for litigating the transaction, to ensure they have time to go to court rather than entering into a consent order with a prior approval condition. This may include companies "litigating the fix," (i.e., having a signed agreement to divest some or all assets that the Commission order would have covered, but without being bound by a prior approval condition).

Policy Statement Background and First Order Pursuant to the Policy Statement

The new policy follows the Commission's vote during its July 2021 open meeting to rescind its 1995 policy statement, which required prior approval and prior notice provisions only when there was a "credible risk" of an unlawful future merger—the idea being that the premerger notification requirements under the HSR Act would suffice for all other transactions.

The Commission's new policy statement was accompanied by a proposed order imposing limits on future acquisitions by DaVita, Inc. of dialysis clinics in the state of Utah. The Commission's complaint, settled by the consent order, alleged that the company's proposed acquisition of the University of Utah Health's dialysis clinics would reduce competition in outpatient dialysis services in the Provo, Utah, market. The order covers a broader geographic area than the markets directly involved, as it requires the company to receive prior approval from the Commission before acquiring any new ownership interest in a dialysis clinic anywhere within the state for ten years.

The agency voted to approve the new policy statement by a 3-2 vote, with Commissioners Noah Phillips and Christine Wilson voting against the policy statement. They have indicated they plan to release a joint dissenting statement. While former Commissioner Rohit Chopra left his post at the FTC on October 8, 2021, to serve as Director of the Consumer Financial Protection Bureau (CFPB), the FTC press release indicated that the vote on the prior approval policy statement was 3-2, which indicates

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that it included his vote (as did the vote on the DaVita consent order that was 5-0) and that the vote occurred before Commissioner Chopra's departure.

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