On the Horizon," *The M&A Lawyer*, Vol. 25, Issue 6, June 2021.

[2] https://ec.europa.eu/competition/international/overview/impact_assessment_report.pdf.

[3] https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf.

FTC RESURRECTS UNILATERAL PREAPPROVAL IN MERGER INVESTIGATION SETTLEMENTS TO HALT FUTURE "ANTICOMPETITIVE" M&A AND INTRODUCES CHANGES TO SECOND REQUEST REVIEWS

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The Federal Trade Commission ("FTC") revived a long-abandoned policy requiring that Commission orders settling FTC merger investigations include a "prior approval" clause that grants the FTC the unilateral authority to approve (or deny) certain future transactions for a minimum of 10 years. The FTC voted in July to restore the prior approval policy, and in October issued new guidance, in addition to its first merger settlement including a prior approval provision. In announcing the policy, the FTC stated its view that "too many deals that should have died in the boardroom get proposed because merging parties are willing to take the risk that they can 'get their deal done' with minimal divestitures." The FTC's dissenting commissioners, in a stinging and wide-ranging dissent, have called the effort a part of "the majority's desire to chill deal activity."

Although prior approval may affect a small absolute number of transactions, companies with a deal subject to a thorough FTC review need to consider the impact of prior approval on their M&A pipeline. Dealmakers also should pay close attention to how the FTC implements the policy, with a particular focus on the scope of prior approval clauses and whether the FTC exercises reasonable judgment in allowing deals without antitrust concerns to proceed. In the absence of restraint, expect more merger litigation with the FTC. It may cause some to reevaluate whether to pursue certain deals.

In September 2021, the FTC also announced several procedural changes to merger review. The goal was to make the FTC's investigation "more streamlined and more rigorous," stating the agency's "unduly narrow approach to merger review may have created blind spots and enabled unlawful consolidation."[1] Those changes are detailed below.

1. What Is the FTC's New "Prior Approval" Policy?

At the end of an FTC investigation into the competitive impact of a merger, the agency may (i) take no action (allowing the parties to close), (ii) challenge the transaction (through its administrative process and, if necessary, seek a federal court injunction against the parties' closing), or (iii)

implement a settlement that permits the transaction to close subject to a divestiture or behavioral remedy. The merging parties may agree to a settlement with the FTC or contest the FTC's challenge in court, which may include "litigating the fix." In the latter context, parties sign a contingent divestiture agreement with a divestiture buyer and argue to the court that their prepackaged remedy solves the concerns that are the subject of the FTC's complaint.

Going forward, FTC merger settlements will include language that requires the buyer to notify the FTC of certain future transactions prior to closing those transactions, and that grants the FTC authority to reject a planned transaction at its sole determination.[2]

- All divestiture orders will include prior approval provisions for every relevant market in which the FTC alleges harm, for a minimum of 10 years ("Prior Approval").
- The FTC likely will seek a potentially broader prior approval order for parties that abandon a transaction *after* the agency files a complaint.
- The FTC is less likely to seek prior approval where parties abandon their transaction before the FTC expends significant resources (*i.e.*, prior to substantial compliance with a second request, the lengthy discovery request through which the FTC seeks information from the parties to inform its investigation).
- The FTC may seek prior approval orders that cover product and geographic markets beyond those affected by the proposed transaction, including related, adjacent, and/or complementary markets. As explained below, by going beyond the market at issue, prior approval could increase the burden and risks for companies subject to the requirement.

All divestiture buyers will need to consent to prior approval for any future resale of the divested business, for a minimum of 10 years, a requirement not included in the FTC's previous policy.

Although not implied by the FTC's policy statement, one should expect there may be some room to negotiate the scope of the Prior Approval.

2. Why Is the FTC Changing Its Policy Now?

The change is another step in the efforts of the current FTC to utilize more demanding standards, aggressive enforcement, and new tools to block or deter mergers. The FTC withdrew its prior policy of requiring prior approval clauses in 1995, citing the success of the Hart-Scott-Rodino Act ("HSR") premerger notification program at adequately protecting the public interest in merger enforcement. The current FTC claims Prior Approval is necessary to prevent "facially anticompetitive deals," preserve Commission resources, and detect deals below HSR reporting thresholds.

In a strongly worded dissent, the dissenting commissioners held little back, calling parts of the Commission's prior approval policy "bonkers crazy."[3] The dissent argued the new policy abrogates the HSR Act, discourages procompetitive transactions, will stifle economic growth, and will result in more, rather than less, strain on Commission resources. Given the level of opposition, the Commission's new prior approval policy may not have a long life if the Commission's political makeup changes.

3. Will the Prior Approval Policy Affect My Transaction?

Both the Department of Justice Antitrust Division ("DOJ") and the FTC review mergers, but only

the FTC has adopted a prior approval policy (so far). The DOJ typically requires parties to agree to provide it with prior notice of future transactions valued below the HSR threshold if in the same market that is the subject of the settlement. But here, the burden remains with the DOJ to obtain a federal court injunction to block a transaction, unlike the FTC's prior approval requirement in which the merging parties have to convince the Commission to grant approval.

The FTC's Prior Approval policy could affect only a small number of transactions. The DOJ and the FTC receive premerger filings for approximately 2,100 transactions a year.[4] Roughly 2% to 4% of those transactions result in a second request investigation (roughly half by the DOJ and half by the FTC), and not all of those investigations result in settlements. Therefore, Prior Approval is not likely to be a concern in the large majority of transactions filed with the U.S. agencies.

4. What Are the Consequences of Prior Approval?

Although the absolute number of transactions affected is likely to be small, the policy might have outsized consequences for companies subject to Prior Approval, depending on how the FTC implements the policy. If merging parties are unwilling to accept an FTC settlement (or there is no settlement offered), the FTC typically must obtain a federal court injunction to block the deal by proving that the transaction will harm competition. Going forward, the FTC will claim that Prior Approval grants it the unilateral right to approve or deny a future transaction subject to the order without resorting to federal court or its own administrative process. The FTC also likely will assert that merging parties have no legal recourse if it does not grant its approval.

The FTC also would not be bound by the timing rules of the HSR Act, which delays closing only for a certain period of time after the parties have complied with the FTC's second request. As a result, Prior Approval creates new uncertainty as to timing and closing of future deals subject to its terms.

The FTC may face fewer objections if it largely limits the scope of Prior Approval to the product and geographic markets at issue in the matter before it, and if it applies historic agency standards and merger law to its review of transactions subject to Prior Approval. If the FTC exercises restraint, there might be little difference in outcomes for transactions that would anyway be reportable under the HSR Act.

Alternatively, if the FTC broadly imposes Prior Approval requirements, subjects those transactions to a higher burden for clearance, and/or takes substantially longer in its reviews, more companies may litigate mergers with the FTC than agree to a Prior Approval settlement. There also could be disputes with the agency about whether the preapproval agreement actually applies to a new proposed merger, and some may challenge the FTC's authority to force prior approval settlements.

5. Should We Expect Expansive FTC Prior Approval Requirements?

The FTC warns that it may seek Prior Approval for future transactions involving product or geographic markets *beyond* the scope of the markets in which the FTC alleges harm from the initial transaction. The FTC says it will consider whether to seek that more expansive Prior Approval based on the following non-exhaustive list of factors: whether (i) the current transaction is substantially similar to a prior transaction the FTC challenged, (ii) the relevant market is already concentrated or has seen significant consolidation, (iii) the transaction significantly would have increased concentra-

tion, (iv) one of the parties had market power, (v) either party has a history of acquisitions in the same or related markets, or (vi) the transaction would have created anticompetitive market dynamics. Those stated considerations may not be much of a roadmap because they are similar to the factors that the FTC considers when deciding whether or not to challenge or seek a remedy in a merger, and therefore may apply to nearly all deals in which the FTC would seek a divestiture and order.

6. How Long Will Prior Approval Orders Last?

A minimum of 10 years, although the FTC will consider longer periods.

7. Has the FTC Invoked Its Prior Approval Policy in Any Deals Yet?

Yes. On the same day as it announced the policy, the FTC entered into a settlement with DaVita, allowing its acquisition of the University of Utah's dialysis clinics to proceed subject to an FTC order with a Prior Approval obligation.[5] DaVita, a "particularly acquisitive company" according to the FTC, must obtain FTC approval before acquiring any new ownership in a dialysis clinic for the next 10 years, anywhere in Utah, a geographic market broader than the City of Provo market alleged in the FTC's complaint. In a concurring statement, Republican Commissioner Wilson cautioned that her vote in favor of the prior approval provision "should not be construed as support for the liberal use of prior approval provisions foreshadowed" by the FTC's Democratic majority.[6]

Since the DaVita settlement, the FTC has included Prior Approval requirements in several merger settlements. For example, the FTC's settlement with Price Chopper related to its acquisition of Tops Market requires divestiture of 12 Tops supermarkets to C&S Wholesale Grocers and a Prior Approval provision.[7] The Prior Approval provision requires that Price Chopper obtain FTC approval before any future acquisition of a supermarket location in the counties in upstate New York and Vermont where the divested stores are located.[8] The FTC's prior approval extends to acquisition of any business that has even one store in any of those counties.

In another example, the FTC entered into a merger settlement with ANI Pharmaceuticals, Inc. and Novitium Pharma LLC that requires the parties to seek prior approval from the FTC for future acquisitions for the two relevant pharmaceutical products as well as two additional drug products because although the parties do not currently compete for the sale of these two products, one of the parties is a current competitor and the other "owns an unexecuted option to acquire a similar product."[9]

8. Will Prior Approval Apply if the Parties Abandon Their Transaction?

The FTC says it will be less likely to seek Prior Approval if the parties abandon their transaction during the FTC's investigation and before the parties have substantially complied with the agency's second request.[10] Although that part of the policy is not likely to affect a large number of transactions, it creates a new risk for companies to consider when making an HSR filing for any deal. Indeed, as the dissenting commissioners stated: "God forbid we should do our job of analyzing deals notified pursuant to the HSR Act."[11]

In contrast, the FTC says it may seek Prior Approval, again based on the six factors above, in cases where the parties abandon a transaction after the FTC initiates or threatens litigation.[12] Parties that abandon a transaction are not likely to consent voluntarily to an FTC order with prior approval, but the FTC could initiate litigation in its adminis-

trative court to attempt to obtain an order with prior approval. For nine years in the 1980s and 1990s, the FTC litigated its attempt to impose a prior approval requirement on Coca-Cola after Coca-Cola abandoned its bid to acquire the Dr Pepper Company.[13] Citing "grounds that future Coca-Cola acquisitions of branded concentrate firms could raise competitive concerns given the conditions in the soft-drink market," the FTC issued a complaint alleging that Coca Cola's proposed, but abandoned, acquisition of Dr Pepper violated the antitrust laws and sought an order requiring prior approval for certain future transactions. The FTC abandoned that effort in 1995 when it withdrew its prior approval policy.[14]

In a statement dissenting to the withdrawal of the 1995 prior approval policy (and in reference to the *Coca-Cola* case), Commissioner Wilson expressed concern about a "vindictive approach" against a party that would have the "temerity to exercise its legal rights and litigate."[15]

9. What Does the FTC's New Policy Say About Buyers of Divested Businesses or Assets?

The FTC also will require the buyers of divested businesses or assets to agree to prior approval for any future sale of those assets, *for a minimum of 10 years*.[16] According to the agency, "this will ensure that the divested assets are not later sold to an unsuitable firm that would contravene the purpose of the Commission's order."[17] The FTC has in some past transactions required divestiture buyers to agree to prior approval terms; now the FTC intends to require all buyers to do so.

For example, in the Price Chopper/Tops transaction, the divestiture buyer, C&S Wholesale Grocers, is prohibited from selling the acquired stores for three years, except to a buyer that has been approved by the FTC, and it must obtain prior approval from the FTC before selling an acquired store to a buyer that operates one or more supermarkets in the same county for an additional seven-year period.

The 10-year obligation will present a new twist in parties' efforts to identify suitable divestiture buyers, as now a buyer may be required to hold divested assets for at least a decade if unable to obtain FTC approval for the resale of that business. It may also undercut the value of the divestiture sale or discourage buyers that see an opportunity to acquire the business, improve its operations or add value by combining it with another business, and then resell it to a third party at a higher value.

10. What Changes Did the FTC Recently Make to Merger Review?

In September, the FTC announced changes to its merger review process, which it says are designed to address an increase in filings under the HSR Act, ensure its merger reviews are "more comprehensive and analytically rigorous," provide "heightened scrutiny to a broader range of relevant market realities," and to "better identify and challenge the deals that will illegally harm competition."[18] The most significant changes include:

- Expanding the scope of its merger investigations beyond those facets that typically associated with the consumer welfare standard, which is the long-standing global consensus standard in antitrust reviews to determine whether harm occurs from a merger. In a nutshell, under the consumer welfare standard, antitrust enforcers intervene in markets or acquisitions only if the conduct harms consumers in a relevant market. The FTC has begun reviewing additional facets of market competition, such as "how a proposed merger

will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete." While the announcement did not elaborate on specific inquiries or how the agency will evaluate information it receives from those queries, there are public reports that FTC requests have include questions about unionization, and environmental, social, and governance ("ESG") issues.

- Requiring a company to provide what it calls "foundational information" before making modifications to a second request, which parties regularly seek to ease the burden of compliance or limit the scope of the investigation. This information includes identifying and describing the "business responsibilities of employees and agents responsible for relevant lines of business, as well as those employees responsible for negotiating, analyzing, or recommending the transaction." The FTC will also require information on how a company maintains responsive data.

- Requiring "information about how [a company] intends to use e-discovery tools before it applies those tools to identify responsive materials," aligning with the DOJ's more demanding approach.

- Rejecting "partial privilege logs" (or abbreviated logs of document withheld on a claim of privilege), which aligns with the DOJ's approach.

- The FTC will expand internal access to second requests and other requests for information to all commissioners and relevant agency offices. Access was previously given only at the Chair's discretion and direction.

In addition, the FTC announced plans to revise its Model Second Request to reflect the changes above. The Model Second Request is a template form for second requests issued by the agency. That document provides parties with guidance about the types of information and materials the agency requests as well as a basis for negotiations on the scope of a second request.

Overall, these modifications to merger review will likely increase the parties' burden for complying with FTC merger investigations, both in terms of cost and time. The parties will need to gather additional information before collecting and reviewing materials it believes to be responsive to the FTC's inquiries. Moreover, the FTC is likely to request submission of information on topics not previously required in second requests, including labor and ESG issues.

Conclusion

How the FTC implements Prior Approval will determine its real impact. If the FTC exercises restraint by limiting the scope of Prior Approval, applying historic agency guidance and merger law, and completing reviews expeditiously, then the outcome under Prior Approval may not differ meaningfully for transactions that would have been subject to HSR review anyhow. If the FTC adopts a more aggressive stance, more merger litigation is likely, and it may cause some to reevaluate whether to pursue certain deals.

Although Prior Approval may affect a small number of companies and transactions in absolute terms, it could have outsized consequences for the M&A strategies of companies subject to it. Companies evaluating a transaction that may result in an FTC settlement need to consider not just the antitrust risk of the deal at hand, but also the potential impact that a 10-year (or more) preapproval clause may have on the company's M&A pipeline and the sequencing of those deals.

Prior Approval might have its greatest effect on parties that have been making or are considering serial acquisitions, businesses in industries expecting further consolidation or subject to repeated M&A transactions, companies with significant market positions, and buyers acquiring targets that the FTC may see as critical future competitors.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]Federal Trade Commission, Bureau of Competition, Blog Post, "Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave," (Sept. 28, 2021), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined.

[2]*See* Federal Trade Commission, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[3]*See* Federal Trade Commission, Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Philips (Oct. 2021) at 6, *available at* https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

[4]Federal Trade Commission & U.S. Dep't Of Justice, Antitrust Div., Hart-Scott-Rodina Annual Report Fiscal Year 2020 (Oct. 2021) at 1, *available at* https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf.

[5]Order to Maintain Assets, In the Matter of DaVita Inc. and Total Renal Care, Inc. (Oct. 25, 2021) at 12-13, *available at* https://www.ftc.gov/system/files/documents/cases/davita_oma_9_24_final.pdf.

[6]Federal Trade Commission, Concurring Statement of Commissioner Christine S. Wilson In the Matter of DaVita Inc., and Total Renal Care, Inc. (Oct. 2021) at 2, *available at* https://www.ftc.gov/system/files/documents/public_statements/1597906/concurring_statement_of_commissioner_christine_s_wilson_in_the_matter_of_davita_inc_and_total_renal.pdf.

[7]In the Matter of Price Chopper/Tops Markets, Press Release (Nov. 9, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/11/ftc-requires-northeast-supermarkets-price-chopper-to-sell-12-stores.

[8]In the Matter of Price Chopper / Tops Markets, Docket No. C-4753, Order to Maintain Assets, (Nov. 8, 2021) at 13, *available at* https://www.ftc.gov/system/files/documents/cases/2110002pricechoppertopsoma.pdf.

[9]*See e.g.*, In the Matter of ANI / Novitium, Press Release (Nov. 10, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/11/ftc-requires-generic-drug-marketers-ani-pharmaceuticals-inc.; see also In the Matter of ANI / Novitium, Docket No. C-4754, Order to Maintain Assets (Nov. 10, 2021), *available at* https://www.ftc.gov/system/files/documents/cases/2110101c4754aninovitiumoma.pdf.

[10]*See* Federal Trade Commission, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 2021) at 2, *available at* https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[11]Federal Trade Commission, Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Philips (Oct. 2021) at 4, *available at* https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

[12]*See* Federal Trade Commission, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 2021) at 2, *available at* https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[13]*See The Coca-Cola Co.*, Docket 9207, Press Release (May 18, 1995), *available at* https://www.ftc.gov/news-events/press-releases/1995/05/coca-co

la-company.

[14]*See* Federal Trade Commission, Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases (Aug. 3, 1995), *available at* https://www.ftc.gov/system/files/documents/public_statements/410471/frnpriorapproval.pdf.

[15]Federal Trade Commission, Oral Remarks of Commissioner Christine S. Wilson (Jul. 21, 2021) at 8-9, *available at* https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf.

[16]*See* Federal Trade Commission, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 2021) at 3, *available at* https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[17]*Id.*

[18]Federal Trade Commission, Bureau of Competition, Blog Post, "Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave," (Sept. 28, 2021), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined.

STOCKHOLDER NOMINEES BARRED FOR NONCOMPLIANCE WITH "CLEAR DAY" ADVANCE NOTICE BYLAW

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In *Rosenbaum v. CytoDyn Inc.*,[1] the Delaware Court of Chancery, in an opinion by Vice Chancellor Slights, upheld a board's decision to exclude stockholder nominees from being considered at CytoDyn's annual meeting based on deficiencies in the stockholders' notice required by the company's advance notice bylaw. The court found that the board had not engaged in any manipulative or inequitable conduct in rejecting the nominees. Even though the board waited almost one month before notifying the stockholders of deficiencies in their nomination notice, the court emphasized that the stockholders had not submitted their notice until close to the deadline, which left no time to fix the deficiencies, and that the bylaw did not in any event require the board to engage in an iterative process with the proponent to fix deficiencies.

Background

Plaintiff stockholders of CytoDyn provided advance notice of their nominations to CytoDyn's board the day before the advance notice deadline in CytoDyn's "commonplace" advance notice bylaw. One month after the deadline, the board sent a deficiency letter to the plaintiffs regarding the disclosures in their nomination notice. The deficiencies identified by the board included the plaintiffs' failure to disclose (i) the identity of a limited liability company formed by one of the plaintiffs (who was also a nominee) to fund the proxy contest, as well as the limited liability company's donors, and (ii) the plaintiffs' support of an acquisition by CytoDyn that had been previously considered and rejected by the board, pursuant to which CytoDyn would acquire a company with ties to two of plaintiffs' nominees and employ one of the nominees who also had patent disputes with CytoDyn. Plaintiffs attempted to address the deficiencies shortly after