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FTC announces that its merger enforcement orders will once again require prior approval before the subject firm can make a future acquisition affecting any relevant market for which a violation was alleged.

On October 25, 2021, the FTC issued a Prior Approval Policy Statement (the “Statement”) reinstating its prior practice of routinely requiring merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting any relevant market for which a violation was alleged. The Policy Statement implements the Commission’s July 21, 2021 vote rescinding its 1995 Policy Statement on Prior Approval and Prior Notice Provisions. The 1995 Statement rescinded the FTC’s long-standing practice of including prior approval and prior notice provisions in Commission enforcement orders concerning mergers.
The Statement describes prior approval provisions as “a critical tool that serves several Commission interests:"

- **Preventing Facially Anticompetitive Deals.** The Statement asserts that too many deals that should have died in the boardroom are proposed because the parties are willing to take the risk that they can get the deal done with minimal divestitures. Now, parties pursuing “facially anticompetitive deals” are on notice that they are at risk of being subject to a prior approval provision, even if they abandon the transaction.

- **Preserving Commission Resources.** The Statement states that conducting a merger review after a petition for prior approval will allow the FTC “to husband its scarce resources without the brinksmanship” of HSR reviews.

- **Detecting Anticompetitive Deals Below the HSR Reporting Thresholds.** Prior approval provisions will reduce the risk that the Commission will not learn of harmful mergers that do not trigger HSR reporting requirements.

Going forward, the FTC will include a ten year prior approval provision in all divestiture orders. However, the Commission is “less likely” to pursue a prior approval provision against parties that abandon their transaction prior to certifying substantial compliance with a Second Request. In matters where the Commission issues a complaint to block a merger and the parties subsequently abandon the transaction, the FTC will engage in a case-specific determination as to whether to pursue a prior approval order.

The Statement also warns that, in situations where “stronger relief is needed,” the FTC may seek a prior approval provision that covers product and geographic markets beyond those affected by the merger. In other words, even future deals that have nothing to do with the transaction that is subject to the FTC settlement may require private approval by the FTC. Among the factors relevant to the determination are:

- **Nature of the transaction** – Are the parties attempting a transaction that is substantially similar to a transaction previously challenged by the FTC or has either party been subject to an enforcement action in the same relevant market?

- **Level of market concentration.**

- **The degree to which the transaction increases concentration.**

- **The degree to which one of the parties likely had market power.**

- **The parties’ history of acquisitiveness.**

- **Evidence of anticompetitive market dynamics.**

In addition, the FTC will require buyers of divested assets to agree to a prior approval for any future sale of the acquired assets for a minimum of ten years.

The Commission appears to believe that the reinstatement of prior approval
provisions will make FTC merger reviews less burdensome and more efficient, but this reinstatement raises the stakes for both buyers and sellers contemplating acquisitions that may be subject to FTC approval. It also further divides how the FTC and DOJ approach merger review, as the DOJ does not have a prior approval policy.

Parties to a transaction subject to FTC approval will want to consult with antitrust counsel to develop a full understanding of the consequences of a potential consent order, and consider alternative up-front strategies that may mitigate the risk.

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