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Axinn Antitrust Insight: FTC Increasing Remedy Burdens

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PRACTICE AREAS

Antitrust

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On October 25, 2021, the Federal Trade Commission issued a statement announcing a return to the practice of including provisions in M&A consent orders that require parties to obtain the FTC's prior approval before closing future transactions in designated markets. The prior approval requirements will last ten years and apply to future transactions that concern the markets affected by the original transaction, and potentially transactions that impact other markets as well. Because such prior approval requests would take place outside the Hart-Scott Rodino Act ("HSR") framework, the new policy gives the Commission significant power over the future transactions requiring prior approval.

The announcement signals a departure from FTC policy as it has stood since 1995, when the Commission discontinued the practice of imposing prior approval restrictions as a matter of course. For the last 25 years, the FTC has been willing to rely upon simpler notification requirements in consent decrees as well as the HSR premerger notification rules for transactions reaching notification thresholds. The current Commission has decided that reviewing transactions via prior approval provisions will be more efficient and a better use of agency resources than relying solely upon HSR review. The two Republican commissioners dissented from the release of the statement. The FTC policy does not affect mergers that are reviewed by the Antitrust Division of the Department of Justice.

There are two significant issues with the Commission's prior approval provisions. First, they would require prior affirmative approval for transactions whether or not they are HSR reportable. This means that even the smallest acquisitions in designated markets will require FTC approval.

More significantly, prior approval requirements do not come with the procedural and timing protections of the HSR Act, including the requirement that the parties are free to close if either no Second Request is issued or if they comply with a Second Request. By contrast, in a prior approval regime, the FTC can investigate at its own pace – a significant

difference in an environment in which FTC leadership has on multiple occasions complained that the agency lacks the resources to investigate HSR-reported matters adequately and has further questioned the appropriateness of having to spend limited investigational resources on acquisitions by what it views as repeat offenders. Thus, the FTC can effectively exercise a pocket veto on affected deals, preventing the parties from closing for an extended period of time, including past the outside date in the merger agreement.

The new Commission policy not only revives the long-abandoned practice of requiring prior approvals, but expands it. The Commission's statement indicates that prior approval requirements may extend not only to the affected markets in the transaction giving rise to the consent order, but also to other product or geographic markets that the Commission finds to be related in some manner. In addition, under certain circumstances – such as in the wake of a transaction abandoned after the FTC brings suit to block a deal – the Commission may seek to impose prior approval orders even in the absence of a negotiated consent decree (which would require a vote by the Commission).

The statement provides no clear guidance for when the FTC might seek to apply consent decree restrictions on a party's M&A activities in ancillary markets. Instead, the statement sets forth a number of relevant considerations to be assessed in a holistic manner, including (1) whether the transaction giving rise to a decree is substantially similar to other attempted acquisitions in the same market challenged by the Commission; (2) the relevant level of market concentration; (3) the degree to which the transaction increases concentration; (4) the degree to which one of the parties to the transaction had pre-merger market power; (5) the parties' "history of acquisitiveness" in the same or related markets; and (6) the extent to which market characteristics create an ability or incentive for anticompetitive market dynamics.

A potential criticism of the Commission's multi-part criteria is that, to the extent they focus on market conditions in the markets giving rise to the original remedy, they do little to justify the imposition of additional restrictions on different markets. It may be, however, that the Commission's language is intended instead to capture cases in which the Commission is aware from its investigation that the acquiring party is on the cusp of gaining market power in adjacent markets, and the decree provides the Commission with an opportunity to preempt transactions that would lead to that result. For now, the practical implication is that the

Commission has considerable discretion in how to apply its opaque new tests as it sees fit.

The Commission's statement also suggests that the FTC could pursue prior approval orders even when the parties abandon the transaction and are not subject to a consent decree, subject to the same multipart test laid out above. However, the FTC indicated it would be less likely to do so if the parties abandon their transaction prior to substantially complying with an HSR Second Request. This may be an attempt to pressure parties to abandon allegedly anticompetitive transactions before the FTC has to expend substantial resources on the matter, but raises many questions and may be the subject of legal challenge if applied in practice.

It was likely no coincidence that the Commission's statement was issued the same day of the first Commission decision including the new prior approval requirement in a consent decree. In the matter of DaVita and Total Renal Care, the FTC entered a decree imposing prior approval requirements against DaVita (and its subsidiary Total Renal Care), an operator of dialysis clinics. Notably, while the FTC's complaint in the matter found the relevant geographical market to be the greater Provo, Utah area, the Divestiture Order included prior approval conditions for any future acquisition of or management contract for any dialysis clinic anywhere in the State of Utah. This suggests that relatively broad prior approval requirements may not be uncommon under the new policy, particularly because the decision was unanimous: even Republican Commissioner Christine Wilson, who has stated that she will issue a "strong dissent" to the Commission's prior approval policy statement, found the broad prior approval order to be appropriate on the specific facts of the DaVita transaction.

While it will take time for the Commission's new policy to take shape, a few immediate takeaways can be drawn from the higher costs that FTC consent decrees will impose on parties future M&A flexibility:

• Parties now have greater incentives at the margins to litigate cases they believe are winnable rather than accepting a consent decree that includes significant long-term burdens. In such cases, parties are likely to structure an acceptable remedy unilaterally and seek to persuade the court in a preliminary injunction motion that this remedy adequately addresses any competitive concerns (as was successfully done in the 2018 AT&T/Time Warner merger litigation).

• For transactions where remedy demands are viewed as unavoidable, parties will have greater incentives to negotiate remedy demands early in the Second Request process at a time when the Commission's statement suggests a more relaxed approach to prior approval requirements, rather than later in the process after the Commission has already committed substantial investigational resources. Parties may also increasingly explore creative fix-it-first strategies that attempt to resolve overlaps without the requirement of a consent decree.

• In negotiating antitrust provisions for M&A transactions, buyers will be motivated to avoid agreeing to efforts standards or other terms that could result in unacceptable long-term consent decree requirements in the context of an otherwise-acceptable remedy. Where possible, buyers may prefer to offer reverse break fees rather than agreeing to efforts standards in which they commit to potential remedy demands that now include the potential for prior approval restrictions extending beyond the scope of an immediate acquisition.