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BLOG

FTC Restores "Prior Approval" Policy

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In another policy change likely to increase the burden on merging parties, the Federal Trade Commission (FTC) announced on October 25, 2021, that it was restoring its pre-1995 practice of routinely requiring parties to merger enforcement settlements to obtain prior approval from the FTC before closing future transactions for a minimum period of ten years. Under the announced Prior Approval Policy Statement, the FTC regularly will require parties that settle with the FTC to resolve charges that a transaction was anticompetitive to notify and seek approval from the FTC for future transactions affecting a relevant market—and sometimes "broader" markets—in which the FTC alleged that the transaction was anticompetitive.

In its Prior Approval Policy Statement, the FTC states that the prior approval requirement will prevent facially anticompetitive deals, preserve Commission resources, and allow the Commission to be notified of transactions not otherwise reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). The HSR Act requires companies to report mergers and acquisitions exceeding certain size thresholds to allow the FTC and the Department of Justice (DOJ) time to review the transaction before the parties close. Under the new policy, the FTC will regularly include in settlement agreements a requirement to notify and receive prior approval from the FTC for future transactions in the relevant market(s)—and "sometimes in broader markets depending on the circumstances"—even if the HSR thresholds are not met. Indeed, on the same day it announced the new policy, the FTC also announced a settlement containing such a prior approval provision that extended the prior approval provision to a broader geographic area than the geographic market alleged by the FTC.

The announcement of the prior approval requirement was not completely unexpected, as the FTC voted in July to rescind a 1995 policy statement that generally disfavored such prior approval and prior notice requirements. Nonetheless, the announcement is another significant FTC policy change that further increases the burden on merging parties and follows other similar announcements, including:

- a "temporary" suspension of grants of early termination that has now lasted more than 18 months (announced jointly with the DOJ);
- the FTC's new practice of issuing "warning letters" to merging parties when the agency believes it has not had sufficient time or resources to fully investigate a transaction;
- the recent unilateral withdrawal by the FTC of the 2020 Vertical Merger Guidelines; and

- the broadening of theories of harm that will be considered by the FTC during merger reviews.

The 3–2 vote to adopt the new prior approval policy fell along party lines. Following the FTC's announcement, Commissioner Noah Phillips issued a statement indicating that he was not given notice that the FTC was announcing the new policy before the agency issued its press release. According to Philipps, the lack of notice prevented him from issuing a dissenting statement. Although Philipps and fellow Republican commissioner Christine Wilson voted against the Prior Approval Policy Statement, each voted in favor of imposing a prior approval requirement in the concomitantly announced settlement.

As with the FTC's recent announcement that it will apply novel theories of harm in merger investigations, it is unclear whether the DOJ also will begin to require prior notice and approval provisions in settlement agreements. If not, the FTC's change is likely to continue to bifurcate the U.S. merger review process, as we discussed previously here. With this latest announcement, whether the DOJ or the FTC reviews a particular transaction may now affect not only the substantive theories of harm explored by the reviewing agency during its investigation but also the scope of the parties' post-settlement compliance obligations.

Conclusion

When planning strategic transactions, merging parties often consider the risk that they will need to settle with the FTC or the DOJ in order to resolve allegations that the transaction will be anticompetitive. With this latest announcement, merging parties facing antitrust risk that are likely to have their transaction reviewed by the FTC should assume that any settlement with the FTC will require them to notify and seek approval from the FTC for any future transactions in the same geographic and product markets in which the transaction was alleged to be anticompetitive.

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Richard Falek

Conor Reidy

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