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FTC Pledges Crackdown on Anticompetitive Mergers and Acquisitions

Commission wants to slam door on “buying binges.”

By Jennifer M. Oliver



Prior approval is once again standard practice. The Federal Trade Commission has resuscitated its long-dormant policy of routinely restricting anticompetitive mergers, putting “industry on notice” that it will once again require aggressive acquirers to obtain prior approval “before closing any future transaction affecting each relevant market for which a violation was alleged, for a minimum of 10 years.”

“Restoring the long-standing prior approval policy forces acquisitive firms to think twice before going on a buying binge because the FTC can simply say no,” said Bureau of Competition Director Holly Vedova.

The Commission rescinded a 1995 policy statement which it says kicked off more than 25 years of industry consolidation by preventing the agency from doing its job, that is, restricting mergers that harm fair market competition. Demonstrating its “new sheriff in town” resolution, the FTC imposed 10 years’ worth of “strict limits” on Utah-based kidney dialysis company DaVita, Inc., which the Commission says has demonstrated a “history of acquisitiveness.”

The vote was 3-2, splitting along party lines. Chairwoman Lina M. Khan, Commissioner Rebecca Kelly Slaughter, and then-outgoing Commissioner Rohit Chopra comprised the Democratic majority voting in favor of the policy. Republican Commissioners Noah Joshua Phillips and Christine S. Wilson voted against.

Application of the Prior Approval Policy Statement will usher in more severe action by the FTC and significantly raise the bar for consummating anticompetitive acquisitions. “Parties settling an anticompetitive deal with a consent order will need the Commission’s permission to close any further acquisition in an affected market, and sometimes in broader markets depending on the circumstances, for at least ten years,” the FTC says.

Key Factors

The Commission will weigh factors including the following in reviewing deals:

- > The nature of the transaction.
- > The level of market concentration.
- > The degree to which the transaction increases market concentration.
- > The degree of pre-merger market power.
- > The parties' history of acquisitiveness.
- > Evidence of anticompetitive market dynamics.

The Commission says it may seek prior approvals even when parties abandon a transaction.

The prior approval tool will help prevent “facially anticompetitive deals,” including those that “should have died in the boardroom” because the parties would otherwise be willing to risk consummating a deal with minimal divestitures, the Commission says.

It will also preserve Commission resources otherwise diverted to challenge mergers via litigation or settlement. The Commission says it will now be able to detect anticompetitive deals that fall below the Hart-Scott-Rodino (HSR) reporting thresholds. Without prior approval, the Commission says it learns about these deals too late to do anything to prevent them or mitigate their impact.

Dissenters Predict Harm to Economic Growth

In their dissent, Commissioners Phillips and Wilson wrote that Commissioners Khan and Slaughter joined forces with a “zombie vote” cast by then-Commissioner Rohit Chopra, a Democrat appointed by President Trump, who was appointed by President Biden as Director of the Consumer Financial Protection Bureau (CFPB) and took office Oct. 12. Calling the action “yet another broadside at the market for corporate control in the United States,” the dissenting commissioners, both Trump appointees, wrote that the prior approval requirement “imposes significant obligations on merging parties and innocent divestiture buyers not with respect to currently pending mergers, but instead with respect to future deals.”

They said the majority's action:

- > Will discourage pro-competitive transactions and stifle economic growth.
- > Is more aggressive than the pre-1995 status quo.
- > Is an effort to abrogate the HSR process.
- > Overstates the benefits and undersells the harms of its new policy.
- > Denies the public the opportunity for input.

The FTC and the Antitrust Division of the Department of Justice have concurrent jurisdiction to review mergers and acquisitions and enforce the federal civil antitrust laws. Although the agencies share jurisdiction, through their interagency clearance process they coordinate on each matter to determine which agency will conduct the review.



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