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FTC Reinstitutes Restrictive "Prior Approval" Merger Control Review Policy

On October 25, 2021, the U.S. Federal Trade Commission ("FTC") announced that it was restoring its former policy of routinely restricting mergers by acquisitive companies that have previously engaged in M&A activity deemed anticompetitive. In its **Policy Statement**, the FTC rescinded a 1995 policy statement that ended the then-longstanding policy of incorporating prior approval and notice provisions in FTC merger orders, resulting in a culture of condition-free merger approvals since that time. Newly installed Competition Bureau Chief Holly Vedova, the personal pick of Biden administration FTC Chair Lina Khan, announced the prior approval policy restoral, stating "[T]he FTC should not have to waste valuable time and resources investigating clearly anticompetitive deals that should have died in the boardroom." According to the Policy Statement, the prior approval policy is intended to block facially anticompetitive deals, preserve FTC merger review resources, address M&A activity falling below Hart-Scott-Rodino ("HSR") reporting thresholds and allow the FTC to block a transaction without having to sue under HSR.

Under the restored prior approval policy, M&A parties settling an FTC action relating to a transaction deemed anticompetitive with a consent order will need FTC prior approval to close any further acquisition in the same market, and perhaps broader markets, for at least 10 years. The specific terms of prior approval provisions in consent orders will be determined by the FTC on a case-specific basis, including consideration of the nature of the transaction, the degree of pre-transaction market concentration and how the transaction would affect market concentration going forward, the purchaser's degree of market power, the parties' acquisitiveness history and evidence of anticompetitive market dynamics. Purchasers of divested assets are also subject to the prior approval policy.

The FTC accompanied issuance of the policy with a concurrent specific enforcement, requiring prior approval for 10 years on future acquisitions by Davita, Inc. of Utah dialysis clinics following the company's acquisition of University of Utah's dialysis clinics.

We have reported on the FTC's moves this year to reestablish an activist merger control review policy. See, "FTC Rescinds 2020 Vertical Merger Guidelines, Reports on Non-HSR Reported Acquisitions by Major Tech Companies and Sets Ambitious Enforcement Agenda," Sept. 29, 2021; "FTC Issues Warning on Use of Debt Retirement in M&A Transactions to Avoid HSR Filings," Sept. 17, 2021; "FTC Lowers 2021 HSR Reporting Thresholds," Feb. 4, 2021. All three client advisories are available for download at **Kurtin PLLC Whitepapers and Advisories**. Yesterday's action was in the continuum of the prior regulatory moves to reassert FTC control over M&A activity deemed anti-competitive, but in practical terms is an enormous shot across the bow of M&A parties of reassertion of affirmative regulatory control over the merger review process. Considering the specific statement by the FTC that the restored prior approval policy is intended in part to sweep up anticompetitive behavior falling below the HSR thresholds, and the FTC's review of how frequently HSR reporting obligations have been ignored even when applicable, all M&A parties and their counsel need to keep the new policy and FTC posture in mind, whatever the size of their transaction.

For additional information, please contact us at **info@kurtinlaw.com**.

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