UNITED STATES OF AMERICA

Federal Trade Commission

WASHINGTON, D.C. 20580

STATEMENT OF THE COMMISSION ON USE OF PRIOR APPROVAL PROVISIONS IN MERGER ORDERS

On July 21, 2021, the Commission voted to rescind the 1995 Policy Statement on Prior Approval and Prior Notice Provisions ("1995 Statement").[1] The 1995 Statement ended the Commission's then-longstanding practice of incorporating prior approval and prior notice provisions in Commission orders addressing mergers. With the rescission of the 1995 statement, the Commission returns now to 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 each relevant market for which a violation was alleged. This is a critical tool that serves several Commission interests:

- *Preventing facially anticompetitive deals.* Too many deals that should have died in the boardroom get proposed because merging parties are willing to take the risk that they can 'get their deal done' with minimal divestitures. Acquisitive firms in particular are too willing to roll the dice on an anticompetitive deal because there are few downsides (from their perspective) to their long-term strategy that contemplates other acquisitions down the road. Parties pursuing facially anticompetitive deals should now know that they are at risk of being subject to a prior approval provision.

- *Preserving Commission resources.* Challenging anticompetitive mergers—through litigation or settlement—is a resource intensive enterprise that puts pressure on the Commission's limited staff and budget. Where the Commission has expended those resources to understand the competitive dynamics and market structure of a particular market, the Commission should not have to incur additional costs by either (1) re-reviewing the same transaction on numerous occasions or (2) reviewing a similar transaction by one of the merging parties in the same market. Investigating the likely effects of a proposed merger under a prior approval provision is much different than a similar investigation under the strictures of the Hart-Scott-Rodino Act ("HSR"), where the merging parties can force a Commission decision to sue. Conducting merger review after a petition for prior approval would allow the Commission to husband its scarce resources without the brinksmanship we encounter during HSR reviews.

- *Detecting anticompetitive deals below the HSR reporting thresholds.* Incorporating prior approval provisions in Commission orders reduces the risk that the Commission will not

[1] Press Release, Fed Trade Comm'n, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter.

learn of harmful mergers that do not trigger federal antitrust reporting requirements. That risk is especially acute for merging parties with a history of attempting anticompetitive transactions. Absent these provisions, the Commission often learns about these deals without sufficient time to investigate and, if necessary, block the transaction.

Going forward, the Commission returns to its prior practice of including prior approval provisions in all merger divestiture orders for every relevant market where harm is alleged to occur, for a minimum of ten years. The Commission is less likely to pursue a prior approval provision against merging parties that abandon their transaction prior to certifying substantial compliance with the Second Request (or in the case of a non-HSR reportable deal, with any applicable Civil Investigative Demand or Subpoena *Duces Tecum*). This should signal to parties that it is more beneficial to them to abandon an anticompetitive transaction before the Commission staff has to expend significant resources investigating the matter.

In addition, from now on, in matters where the Commission issues a complaint to block a merger and the parties subsequently abandon the transaction, the agency will engage in a case-specific determination as to whether to pursue a prior approval order, focusing on the factors identified below with respect to use of broader prior approval provisions. The fact that parties may abandon a merger after litigation commences does not guarantee that the Commission will not subsequently pursue an order incorporating a prior approval provision.

Use of Broader Prior Approvals Where Additional Relief Needed. In some situations where stronger relief is needed, the Commission may decide to seek a prior approval provision that covers product and geographic markets beyond just the relevant product and geographic markets affected by the merger. The following non-exhaustive list of factors will be relevant to this determination. No single factor is dispositive; rather, the Commission will take a holistic view of the circumstances when determining the length and breadth of prior approval provisions.

1. *Nature of the transaction.* Whether the merging parties are attempting a transaction that is substantially similar to a transaction that was previously challenged by the Commission—even if the prior matter was not litigated (i.e., even if the parties previously abandoned the transaction). A subsequent transaction is "substantially similar" to a prior transaction if it includes some or all of the assets implicated in a prior transaction challenged by the Commission. Similarly relevant is whether either party had been subject to a merger enforcement action in the same relevant market.

2. *Level of market concentration.* Whether the relevant market alleged is already concentrated or has seen significant consolidation in the previous ten years.

3. *The degree to which the transaction increases concentration.* Whether the transaction significantly increases concentration.

4. *The degree to which one of the parties pre-merger likely had market power.* Whether, pre-merger, one of the parties likely had market power. There may be instances where the combination of a nascent or fringe competitor with a company with a high market share does not increase concentration much but raises significant competitive concerns.

5. *Parties' history of acquisitiveness.* Whether either party to the transaction has a history of, or has indicated a desire to enter into, acquisitions in the same relevant market, in related markets (i.e., upstream or downstream firms), or in adjacent or complementary products or geographic areas.

6. *Evidence of anticompetitive market dynamics.* Whether the market characteristics create an ability or incentive for anticompetitive market dynamics post-transaction.

Divestiture Buyers. The Commission will also require buyers of divested assets in Commission merger consent orders to agree to a prior approval for any future sale of the assets they acquire in divestiture orders, for a minimum of ten years. This will ensure that the divested assets are not later sold to an unsuitable firm that would contravene the purpose of the Commission's order. The Commission has on occasion in the past required divestiture buyers to agree to such prior approval terms; going forward the Commission intends to require all buyers to do so.