

THE FTC ANNOUNCES ITS INTENT TO INCLUDE PRIOR APPROVAL PROVISIONS IN MERGER ORDERS

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The Federal Trade Commission (“FTC”) recently issued a [policy statement](#) announcing its intention to require merging parties subject to an FTC order for pursuing an anticompetitive merger to obtain prior approval from the FTC before closing certain *future* merger transactions.¹ This new FTC policy statement affects hospitals, health systems or other health care providers considering a merger because their ability to pursue future mergers could be limited if the FTC challenges their current merger as anticompetitive.

This policy statement signals the FTC’s return to a practice it had not adopted for more than twenty-five years. Until recently, the FTC had followed the 1995 Policy Statement on Prior Approval and Prior Notice Provisions, which ended the practice (at the time) of including prior approval and prior notice provisions in merger orders. A majority of the FTC’s commissioners rescinded that 1995 policy statement in July.

The FTC will now include prior approval provisions in all merger orders for every relevant market where competitive harm is alleged to occur, for a minimum of ten years. Notably, the policy statement indicates that in certain circumstances, the FTC may even “seek a prior approval provision that covers product and geographic markets beyond just the relevant product and geographic markets affected by the merger.”² In other words, going forward, FTC merger orders could potentially require the parties subject to them to seek approval from the FTC of any future mergers, even if they are unrelated to the current mergers, for ten years or longer. The factors the FTC will consider in determining whether a prior approval provision extends beyond the scope of the current merger include the nature of the transaction, the level of market concentration, the degree to which the transaction increases competition, the degree to which one of the parties pre-merger likely had market power, the parties’ history of acquisitiveness, and evidence of market dynamics.³

According to the majority of FTC commissioners who adopted this policy statement, the use of prior approval provisions will prevent facially anticompetitive deals, preserve scarce resources at the FTC, and help the FTC detect anticompetitive deals below the Hart-Scott-Rodino Act reporting thresholds.⁴ But the two commissioners who opposed the adoption of this policy statement noted that the FTC’s use of prior approval provisions in merger orders also has the potential to chill legal merger activity and gives the FTC the power to act more like a regulator than a law enforcement agency.⁵ The dissenting commissioners described the policy statement as “yet another daft attempt by a partisan majority of commissioners to use bureaucratic red tape to weight down all transactions – not just potentially anticompetitive ones”⁶

Hospitals, health systems, and other health care providers considering a merger will now have to include the potential implications of a prior approval provision in their antitrust risk assessment of the transaction. If the FTC successfully challenges the transaction and requires the parties to enter a merger order, the order could contain a prior approval provision that would allow the FTC to deny a hospital's, health system's, or other health care provider's ability to close future merger transactions in the relevant market and unrelated markets for more than ten years.

If you have questions about the implications of this policy statement for your transaction or other questions about compliance with the antitrust laws, please contact a member of Hancock Daniel's [Antitrust](#) team.

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¹ Federal Trade Commission, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021) [hereinafter Prior Approval Provisions Statement], *available at* https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

² Prior Approval Provisions Statement at 2.

³ *Id.* at 2-3.

⁴ *Id.* at 1-2.

⁵ Federal Trade Commission, Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips (Oct. 29, 2021) [hereinafter Dissenting Statement], *available at* https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

⁶ *Id.* at 2.