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PRIOR APPROVAL PROVISIONS IN FTC MERGER CONSENT ORDERS

To Our Clients and Friends:

In this alert, we discuss the Federal Trade Commission's recent reinstatement of a long dormant policy restricting certain future acquisitions by parties that hereafter enter into an FTC consent order.[1] Since announcing the return of the policy in October 2021, the Commission has included prior approval provisions in each of the seven consent orders issued in connection with conditional approval of mergers. Below, we provide details on these prior approval provisions and describe practical implications of the FTC's prior approval policy change for companies considering transactions that may be subject to such requirements. Despite the policy reinstatement, FTC consent order terms—including prior approval provisions—remain subject to negotiation between the merging parties and the FTC.

Recent FTC Policy Changes Requiring Prior Approval in Merger Consent Orders

The FTC's prior approval policy arises in the context of a Commission action to block or restructure a proposed merger. Prior to 1995, the FTC required all companies that entered into a consent decree to settle such an action with a divestiture to obtain prior approval from the FTC for any future transaction in at least the same product and geographic market for which a violation was alleged. The Commission's 1995 Policy Statement on Prior Approval and Prior Notice Provisions ("1995 Policy Statement") did away with that condition, requiring prior approval and prior notice only when there was a "credible risk" of an unlawful merger, without regard for market conditions or a company's prior merger activity.[2]

In July 2021, the FTC voted 3-2 to rescind the 1995 Policy Statement, with Chair Khan, Commissioner Slaughter, and then-Commissioner Chopra voting in favor, and Commissioners Phillips and Wilson dissenting.[3] In support of her vote, Chair Khan cited the FTC's "strapped resources." She stated that since the FTC reduced its use of prior approval provisions following the 1995 Policy Statement, the agency had re-reviewed a number of the same or similar proposed transactions that the Commission had previously determined to be problematic. Similarly, she noted that companies in several cases had sought to buy back assets that the Commission had previously ordered those same companies to divest.[4] Commissioner Chopra made similar remarks in favor of the policy change, emphasizing that "Commission staff is stretched to the breaking point," and arguing that this policy supports the Commission goal of "prevent[ing] egregious repeat offenses."[5] In his dissenting opinion, Commissioner Phillips argued that this policy change will deter consent agreements, increase the number of merger challenges brought before a court, and result in less competition among companies by, for example, reducing competition in bidding processes as a potential bidder may be less attractive if it is subject to a prior approval provision.[6] And Commissioner Wilson argued in her dissent that the purported justification for the policy change is unsupported by empirical evidence and will result in wasted resources and less certainty.[7]

Subsequently, the FTC issued a Prior Approval Policy Statement in October 2021 ("2021 Policy Statement"), again by a 3-2 vote along party lines, that restored the Commission's pre-1995 practice of restricting future acquisitions by parties subject to an FTC consent order.[8] Under the 2021 Policy Statement:

- Parties settling a proposed transaction with a merger divestiture order will need to obtain prior approval from the Commission before closing any future transaction affecting each relevant market for which a violation was alleged, for a minimum of ten years.

- The Commission may seek prior approval provisions that extend to broader markets than the product and geographic markets affected by the challenged merger, depending on the circumstances.

- The Commission will weigh a number of factors in determining the scope of a prior approval provision, including: the nature of the transaction (i.e., whether the transaction includes some or all of the assets implicated in a prior transaction challenged by the Commission, or whether either party was subject to a merger enforcement action in the same relevant market); the level of market concentration and degree to which the transaction increases market concentration; the degree of pre-merger market power held by one of the parties; the parties' history of acquisitions in the same relevant market, in upstream or downstream related markets, or in adjacent or complementary products or geographic areas; and evidence that market characteristics create an ability or incentive for anticompetitive market dynamics post-transaction.

- The Commission will also require buyers of divested assets in FTC 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.

- The Commission is less likely to pursue a prior approval provision against merging parties that abandon their transaction prior to certifying substantial compliance with a Second Request (or in the case of a non-HSR reportable deal, with any applicable Civil Investigative Demand or Subpoena *Duces Tecum*). However, the Commission may seek an order incorporating a prior approval provision even in matters where the Commission issues a complaint to block a merger and the parties subsequently abandon the transaction.

In a dissenting statement, Commissioners Wilson and Phillips characterized the 2021 Policy Statement as a "broadside at the market for corporate control in the United States" and expressed concerns that "[d]espite its unassuming label, a 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."[9] During panel discussions at the American Bar Association's Antitrust Spring Meeting in April 2022, both dissenting Commissioners reiterated their concerns regarding the policy change. Commissioner Wilson suggested that prior approval requirements raise significant due process concerns and argued that this policy change disincentivizes potential divestiture buyers from assisting the FTC in resolving its competitive concerns.[10] Commissioner Phillips similarly stated that the requirements opposed on divestiture buyers are "like a penalty for helping."[11]

Recent Consent Orders Containing Prior Approval Provisions

Since issuing the 2021 Policy Statement, the FTC has entered into consent agreements containing prior approval provisions to resolve competitive concerns in seven proposed transactions.

Dialysis Services Transaction. The FTC challenged a dialysis company's proposed acquisition of a number of dialysis clinics from another provider in Utah in October 2021, alleging that the proposed acquisition would reduce competition and increase concentration in the provision of outpatient dialysis services in the greater Provo, Utah area. In the first consent agreement to contain a prior approval provision following the FTC's announcement of its revised prior approval policy, the buyer agreed to divest four outpatient dialysis clinics to a third party. The consent agreement also required the buyer to seek prior approval from the FTC for a ten-year period before: (1) acquiring an ownership or leasehold interest in any facility that has operated as an outpatient dialysis clinic within six months prior to the date of the proposed acquisition, within the State of Utah; (2) acquiring an ownership interest in any individual or entity that owns any interest in or operates an outpatient dialysis clinic within the State of Utah (but only with respect to that individual or entity's interest in clinics operated Utah); or (3) entering into any contract for the buyer to participate in the management or business of an outpatient dialysis clinic located within the State of Utah. Notably, the consent agreement did not contain a prior approval provision binding the divestiture buyer.

Generic Pharmaceuticals. In November 2021, the FTC's challenged ANI Pharmaceuticals, Inc.'s ("ANI") proposed acquisition of Novitium Pharma LLC ("Novitium"), alleging that the transaction likely would have harmed competition in the U.S. markets for generic sulfamethoxazole-trimethoprim ("SMX-TMP") oral suspension, an antibiotic used to treat infections, and generic dexamethasone tablets, an oral steroid product used to treat inflammation. The FTC approved a final consent order settling those charges in January 2022, pursuant to which ANI and Novitium agreed to divest ANI's rights and assets to generic SMX-TMP oral suspension and generic dexamethasone tablets to Prasco LLC ("Prasco"). The consent order imposed prior approval provisions on the merging parties as well as on the divestiture buyer. The order required ANI and Novitium to seek prior approval from the FTC before acquiring any rights or interests in the two relevant markets (generic SMX-TMP and generic dexamethasone), or the therapeutic equivalent or biosimilar of those products, as well as before acquiring any rights or interests in a third pipeline product, erythromycin/ethylsuccinate products, or the therapeutic equivalent or biosimilar of those products. Additionally, for three years, Prasco must seek prior approval before selling or licensing any FDA authorizations for the divested assets, and for an additional seven years thereafter Prasco must seek prior approval before selling or licensing any FDA authorizations for the divested assets to anyone who owns or is seeking approval for an FDA authorization to manufacture or sell a therapeutic equivalent of a divested product.[12]

More recently, in April 2022, the FTC challenged Hikma Pharmaceuticals' ("Hikma") proposed acquisition of Custopharm, Inc. ("Custopharm"), alleging that the transaction would likely substantially lessen competition in the U.S. market for generic injectable triamcinolone acetonide ("TCA"), a corticosteroid used for severe skin conditions, allergies, and inflammation. As part of the transaction, Custopharm's parent company, Water Street Healthcare Partners, LLC ("Water Street"), agreed to retain and transfer Custopharm's pipeline TCA product, assets, and business to another company Water Street

owns, Long Grove Pharmaceuticals, LLC. Under the terms of the consent order entered to resolve the FTC's allegations, for ten years, Hikma will not acquire any rights or interests in the divested TCA product, assets, and business, or the therapeutic equivalent or biosimilar thereof, without the prior approval of the Commission. The consent order further provides that Water Street shall not sell, transfer, or otherwise convey any interest in the divested TCA assets or business for four years without the prior approval of the Commission. The consent order also includes a novel requirement that the divestiture buyer and its parent company not terminate the operations of the divested TCA business and take all actions necessary to maintain the full economic viability, marketability, and competitiveness of the divested TCA assets and business.[13]

Grocery Stores. Two New York-based supermarket operators—The Golub Corp. ("Golub"), which owns the Price Chopper chain, and Tops Market Corp. ("Tops")—sought to merge in a transaction that would have created a combined company with nearly 300 supermarkets across six states. In its November 2021 complaint challenging the transaction, the FTC alleged that the proposed merger would substantially lessen competition in the retail sale of food and other grocery products in supermarkets in nine counties in New York and one county in Vermont. To settle those charges, Golub and Tops entered into a final consent agreement with the FTC in January 2022 pursuant to which the merging parties agreed to divest 12 Tops stores and related assets to C&S Wholesale Grocers, Inc. ("C&S"). The consent agreement requires Golub and Tops to obtain prior approval from the FTC for a ten-year period before acquiring any facility that has operated as a supermarket, as well as before acquiring an interest in any entity that has owned or operated a supermarket, in the ten counties comprising the relevant geographic markets alleged in the complaint within six months prior to the date of such proposed acquisition. The consent agreement also requires C&S to seek prior approval for a three-year period before selling a divested supermarket, and for an additional seven-year period before selling a divested supermarket to any person that owned an interest in supermarket located in the same county as the divested supermarket within six months prior to the date of such proposed sale.[14]

Retail Fuel Assets. In December 2021, the FTC challenged Global Partners LP's ("Global") proposed acquisition of 27 retail gasoline and diesel outlets from Richard Wiehl ("Wiehl"). The FTC alleged that the transaction would harm competition for the retail sale of gasoline in five local Connecticut markets, as well as for the retail sale of diesel fuel in four of those markets. Pursuant the FTC's consent order, Global and Wiehl were required to divest to Petroleum Marketing Investment Group ("PMG") six Global retail fuel outlets and one Wheels retail fuel outlet. Under the order, Global must obtain FTC prior approval for a ten-year period before acquiring an interest in any retail fuel business within a two-mile driving distance from any of the seven divested fuel outlets. Additionally, PMG must not, without FTC prior approval, sell or otherwise convey any of the divested fuel outlets for a period of three years, or sell any of the divested fuel outlets for an additional seven-year period, to any person who owned an interest in any retail fuel business within a two-mile driving distance from any of the seven divested fuel outlets.[15]

Oil and Gas Production Assets. In March 2022, the FTC challenged a proposed transaction that would have combined two of four significant oil and gas development and production companies in northeast Utah's Uinta Basin, alleging that it would harm competition in the relevant product market for the development, production, and sale of Uinta Basin waxy crude to Salt Lake City area refiners, as well as

in a narrower relevant product market for the development, production, and sale of Uinta Basin yellow waxy crude to Salt Lake City area refiners. The complaint alleged harm in a relevant geographic market no broader than the Uinta Basin, as well as in an alternative relevant geographic market consisting of the Salt Lake City area. To resolve the FTC's allegations, the merging parties entered into a consent agreement with the FTC pursuant to which they agreed to divest certain assets in Utah to a third party. The prior approval provision in the consent agreement required the buyer to receive FTC prior approval for a ten-year period before acquiring any ownership, leasehold, or other interest in any person that has produced or sold, on average over the six months prior to the acquisition, more than 2,000 barrels per day of waxy crude in seven Utah counties, as well as before acquiring any ownership or leasehold interest in lands located in those seven Utah counties where the transaction—or sum of transactions with the same counterparty during any 180-day period—results in an increase in the buyer's land interests in those seven counties of more than 1,280 acres. The consent agreement also requires the divestiture buyer to obtain prior approval for a three-year period before selling the divested assets, as well as for an additional seven-year period before selling the divested assets to any person engaged in the development, production, or sale of Uinta Basin waxy crude in seven Utah counties.

Glass Enamel and Colorants. The FTC challenged Prince International Corp.'s ("Prince") proposed acquisition of Ferro Corp. ("Ferro") in April 2022, alleging that the proposed acquisition would substantially lessen competition in the North American market for porcelain enamel frit and in the worldwide markets for glass enamel and forehearth colorants. To resolve the FTC's competitive concerns, the parties entered into a consent agreement requiring Prince and Ferro to divest three facilities to a third party: a porcelain enamel frit and forehearth colorants plant in Leesburg, Alabama; a porcelain enamel frit and forehearth colorants plant and research center in Bruges, Belgium; and a glass enamel plant in Cambiago, Italy. Under the terms of the consent order, the merged company must obtain prior approval from the Commission for ten years before buying assets to manufacture and sell porcelain enamel frit in North America, or before buying assets to manufacture and sell glass enamel or forehearth colorants anywhere in the world. The consent order also requires the divestiture buyer to obtain prior approval for three years before transferring any of the divested assets to any buyer, and for seven additional years before transferring any of the divested assets to a buyer that manufactures and sells porcelain enamel frit, glass enamel, or forehearth colorants.[16]

Key Takeaways for Parties Considering Transactions that May be Subject to FTC Consent Orders

Negotiation of Merger Agreements Should Anticipate Prior Approval Provisions in FTC Investigations that Result in Consent Orders. Merging parties should expect that the FTC will require a prior approval provision in any transaction in which potential competitive concerns can be resolved with a divestiture. There may be some flexibility, however, to negotiate the precise contours of a prior approval requirement with the FTC to fit the unique circumstances of a particular transaction. Buyers should therefore consider seeking flexible merger agreement language to avoid being obligated to accept a prior approval provision that would unreasonably impede their ability to pursue potential future transactions, particularly in an area broader than the specific competitive concerns the FTC is likely to have in the earlier transaction. Sellers, on the other hand, would benefit from seeking assurances obligating the buyer to agree to a reasonable prior approval provision to the extent the FTC requires a

divestiture to resolve competitive concerns while, at the same time, appreciating a buyer's reluctance to agree to take on risks associated with a broadly worded obligation.

Negotiation of Prior Approval Provisions with FTC Should Ensure They Do Not Result in Broader Consequences than Intended. A prior approval provision in certain circumstances could apply to any subsequent transaction involving assets that are covered by the prior approval, even if that transaction also includes assets that fall outside the prior approval's scope. For this reason, parties should carefully negotiate the scope of prior approval provisions with potential future transactions in mind to avoid agreeing to overly broad terms that may impact the timing and risks in future transactions involving assets that include both in-scope and out-of-scope assets.

Product and Geographic Scope Generally Limited to Divestiture Markets. The 2021 Policy Statement suggests that prior approval provisions in FTC consent orders, under certain circumstances, may extend beyond the relevant product and geographic markets affected by the merger. So far, however, the prior approval provisions included in FTC consent orders since the 2021 Policy Statement have generally been narrowly drawn around the divestiture product and geographic areas, and any extensions beyond the relevant markets defined in the FTC's complaints have been relatively limited. Merging parties should be in a position to comply with a Second Request and be prepared to litigate if needed to gain leverage to secure a settlement on reasonable terms if the FTC seeks to impose prior approval provisions broader than the markets in which the parties have agreed to divest assets.

Duration. Despite the 2021 Policy Statement's proclamation that prior approval provisions will cover "a minimum of ten years," none of the prior approval provisions included in the consent orders entered since the 2021 Policy Statement have extended beyond a ten-year period. Additionally, all but one of the consent orders issued include prior approval provisions applicable to buyers of divested assets. With the exception of the four-year period applied to the divestiture buyer in *Hikma/Custopharm*, the prior approval provisions for divestiture buyers generally cover a three-year period during which the divestiture buyer must obtain prior approval before conveying the divested assets to another buyer, followed by a seven-year period during which the divestiture buyer must seek prior approval before conveying the divested assets to a buyer that operates in a similar product and geographic market as the divested assets.

Transactions Abandoned Post-Complaint. The 2021 Policy Statement put merging parties on notice that even if they abandon a proposed merger after litigation commences, the Commission may subsequently pursue an order incorporating a prior approval provision. To obtain such an order the FTC would have to pursue an enforcement action in its administrative court seeking injunctive relief to prevent a potential recurrence of the alleged violation, which would likely require significant resources. Since the 2021 Policy Statement was issued, the FTC has yet to pursue such an order against merging parties who have abandoned post-complaint but before fully litigating the challenged transaction.[17] There have been indications, however, that the FTC is exploring the possibility of seeking an order against Hackensack Meridian Health and Englewood Healthcare—who abandoned their proposed merger after the Third Circuit upheld a preliminary injunction entered by the U.S. District Court for the District of New Jersey enjoining the merger—that would require the two hospital systems to provide prior notice should they attempt the same merger in the future.[18]

Lack of Convergence with DOJ Policy. The Antitrust Division currently does not have a similar policy requiring prior approval provisions in divestiture orders. Assistant Attorney General Jonathan Kanter's recent statements about the inadequacy of divestiture remedies and proclamations that the Antitrust Division's "duty is to litigate, not settle,"[19] suggest that the agency will enter into fewer consent decrees conditionally approving deals with divestitures than in prior administrations. It remains to be seen whether, for such decrees, the Antitrust Division will follow in the FTC's footsteps with regard to prior approval provisions although, in the first consent decree issued since the new Assistant Attorney General took office, the decree did not include such a provision.

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[1] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), here.

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

[3] *Id.*

[4] Remarks of Chair Lina M. Khan Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions (July 21, 2021), here.

[5] Prepared Remarks of Commissioner Rohit Chopra Regarding the Motion to Rescind the Commission's 1995 Policy Statement on Prior Approval and Prior Notice (July 21, 2021), here.

[6] Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), here.

[7] Oral Remarks of Commissioner Christine S. Wilson (July 21, 2021), here.

[8] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), here.

[9] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 29, 2021), here.

[10] Matthew Perlman, *FTC's Republicans Say Leaders Think Mergers are 'Evil'*, Law360, Apr. 6, 2022, here.

[11] *Id.*

[12] *See* Complaint, *In the Matter of ANI Pharmaceuticals, Inc., Novitium Pharma LLC, and Esjay LLC* (Nov. 10, 2021), here; Decision and Order, *In the Matter of ANI Pharmaceuticals, Inc., Novitium Pharma LLC, and Esjay LLC* (Jan. 12, 2022), here.

[13] *See* Complaint, *In the Matter of Hikma Pharmaceuticals PLC, et al.* (Apr. 18, 2022), here; Decision and Order, *In the Matter of Hikma Pharmaceuticals PLC, et al.* (Apr. 18, 2022), here.

[14] *See* Complaint, *In the Matter of The Golub Corporation, Tops Markets Corporation, and Project P Newco Holdings, Inc.* (Nov. 8, 2021), here; Decision and Order, *In the Matter of The Golub Corporation, Tops Markets Corporation, and Project P Newco Holdings, Inc.* (Jan. 24, 2022), here.

[15] *See* Complaint, *In the Matter of Global Partners LP and Richard Wiehl* (Dec. 20, 2021), https://www.ftc.gov/system/files/ftc_gov/pdf/final_global_wiehl_complaint_0.pdf; Decision and Order, *In the Matter of Global Partners LP and Richard Wiehl* (Dec. 20, 2021), https://www.ftc.gov/system/files/ftc_gov/pdf/final_global_wiehl_order_0.pdf.

[16] *See* Complaint, *In the Matter of American Securities Partners VII, Prince International Corporation, and Ferro Corporation* (Apr. 21, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110131ASPFerroComplaint.pdf; Decision and Order, *In the Matter of American Securities Partners VII, Prince International Corporation, and Ferro Corporation* (Apr. 21, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110131ASPFerroDecisionOrder.pdf.

[17] *See, e.g.*, Statement Regarding Termination of Nvidia Corp.'s Attempted Acquisition of Arm Ltd. (Feb. 14, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-nvidia-corps-attempted-acquisition-arm-ltd; Statement Regarding Termination of Lockheed Martin Corporation's Attempted Acquisition of Aerojet Rocketdyne Holdings Inc. (Feb. 15, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-lockheed-martin-corporations-attempted-acquisition-aerojet; Statement Regarding Termination of Attempted Merger of Rhode Island's Two Largest Healthcare Providers (Mar. 2, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/03/statement-regarding-termination-attempted-merger-rhode-islands-two-largest-healthcare-providers.

[18] *See, e.g.*, Respondents' Reply in Support of Motion to Dismiss Complaint, *In the Matter of Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation*, Dkt No. 9399 (Apr. 20, 2022), here.

[19] Prepared Remarks of Assistant Attorney General Jonathan Kanter, Antitrust Enforcement: The Road to Recovery (Apr. 21, 2022), ttps://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler.

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