FTC Restores and Implements Prior Approval Rule with Provision in DaVita Divestiture Order

In July 2021, President Biden's executive order called on federal agencies to strengthen antitrust enforcement in the healthcare industry to promote and revitalize healthcare competition and price transparency in the U.S. In response to the call to action, the agencies, particularly the Federal Trade Commission (FTC), have mobilized and stepped up their efforts by providing additional guidance and oversight of consolidation in the healthcare market. In this issue of Litigation and Enforcement Highlights, we take a look at the FTC's reinstatement and implementation of the prior approval rule, the latest regulatory action that will impact consolidation in the healthcare provider market.

Reinstatement and Expansion of the Prior Approval Rule

One of the major federal regulatory actions that will impact healthcare consolidation is the FTC's recent reinstatement of the prior approval rule. This rule allows the FTC to require a merging entity to provide notice and obtain approval before consummating future mergers and acquisitions, if the FTC has determined that the entity has pursued a merger that was considered anticompetitive. This rule may apply for a minimum of ten years in every relevant market where the FTC alleged that harm would have occurred from the proposed transaction. The FTC may institute this rule as a condition in challenged mergers that are ultimately approved, for example as a provision in a divestiture or consent order agreed to by the

FTC. Importantly, the prior approval rule applies regardless of whether the challenged merger was eventually approved or consummated, i.e., the FTC may seek prior approvals even when parties abandoned a transaction. In other words, entities that saw their proposed merger challenged by the FTC on antitrust grounds will need the Commission's permission for any future acquisition in the affected market.

Notably, the prior approval rule was a longstanding practice of the FTC until it was rescinded in 1995. Since then, the FTC has only had prior approval authority for transactions that trigger the Hart-Scott-Rodino (HSR) Act threshold, which indicates a certain level of market concentration. According to [FTC Chair Lina Khan](), however, "Since the FTC substantially reduced using these prior approval provisions, the agency has encountered numerous examples of companies repeatedly proposing the same or similar deals in the same market, despite the fact that the Commission had earlier determined that those deals were problematic." As a result, having to reinitiate investigations and pursue new legal challenges placed unnecessary burden on the limited resources at the agency.

The [new rule]() not only reinstates the original policy that was in place prior to 1995, but also goes beyond the old policy. First, the requirement is set for a minimum of ten years, instead of being capped at ten years as it did previously. Second, the new rule also applies to buyers of divested assets, rather than just the sellers pre-1995. Lastly, the Commission may seek a prior approval provision that covers product and geographic markets beyond just the relevant product and geographic markets affected by the merger. Factors that would be relevant to this determination include 1) nature of the transaction, 2) level of market concentration, 3) the degree to which the transaction increases concentration, 4) the degree to which one of the parties had market power pre-merger, 5) parties' history of acquisitiveness, and 6) evidence of anticompetitive market dynamics.

The Commission narrowly approved the new policy by a vote of 3-2, where Republican Commissioners Noah Joshua Phillips and Christine S. Wilson issued a dissenting statement, stating that the policy would have the effect of chilling merger activity altogether. However, broadening the agency's oversight authority applying the prior approval rule to merging entities that have been previously investigated and flagged by the FTC for antitrust concerns could help better monitor anticompetitive mergers. The FTC applied this new authority in the case of a recent healthcare acquisition in Utah.

Implementation of Prior Approval Provision in DaVita Consent Order

While the FTC voted to restore the prior approval rule shortly after the executive order was issued in July 2021, the Commission officially announced the new policy in connection with its implementation in the divestiture order in the proposed DaVita-University of Utah Health transaction.

DaVita proposed to acquire University of Utah Health's 18 dialysis clinics that span Nevada, Utah, and part of Idaho. The FTC filed an administrative complaint due to concern that "the acquisition would eliminate actual, direct, and substantial competition between DaVita and the University in the market for outpatient dialysis services" in the Provo, Utah area, where there are only three providers of outpatient dialysis services. According to the complaint, the proposed transaction would allow DaVita to own seven of the eight facilities in the Provo market and reduce the number of providers to only two competitors, "increasing the ability of the merged entity unilaterally to raise prices for outpatient dialysis services and reducing incentives to improve service or quality in the relevant market."

On October 25, the FTC issued a proposed consent order that requires DaVita to divest three clinics in the Provo area to competing provider Sanderling Renal Services. In addition, DaVita is prohibited from enforcing any non-compete agreements with the University of Utah or competitor Sanderling. Most importantly, on top of the divesture order, the FTC imposed a prior approval provision, pursuant to the newly adopted policy, that requires the dialysis chain to obtain prior approval from the FTC before acquiring any new ownership interest in a dialysis clinic anywhere in Utah for a period of ten years. As permitted under the new policy, the DaVita order extended and applied the prior approval requirement beyond markets directly impacted by the transaction. Commissioner Christine Wilson stated the FTC came to this determination because "DaVita has engaged in a pattern of acquiring independent dialysis facilities; many of these acquisitions fall below HSR thresholds and consequently escape pre-merger review, including this proposed acquisition." With the prior approval provision, the FTC will be able to quickly identify any future anticompetitive transactions by DaVita, which is known to have a history of fueling consolidation in the industry.

Overall, the prior approval requirement is a useful regulatory tool that the FTC can use to prevent facially anticompetitive transactions and detect other anticompetitive deals that fall below the HSR reporting thresholds. Additionally, challenging anticompetitive mergers is a resource intensive endeavor. This requirement will help the Commission preserve resources already expended in investigating and understanding the competitive dynamics of a particular market in previous challenges.