Prior Approval Remedies in M&A: Agency Policy and Practice

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For twenty-five years prior to the Biden Administration, FTC and DOJ consent agreements have had a singular goal: to remedy the anticompetitive effects of proposed transactions. Under former Chair Khan, however, the FTC expanded the use of consent orders with an aim toward preventing some future anticompetitive transactions. Pursuant to a 2021 policy statement,[2] the FTC returned to its pre-1995 practice and now requires that all merger consent orders contain "prior approval" provisions requiring the buyer to obtain the Commission's affirmative approval before it can acquire companies or assets in the same relevant market for a specified period, usually ten years.

An examination of recent consent decrees demonstrates that although the FTC has closely followed the 2021 policy statement, the DOJ has not implemented prior approval in its consent decrees. Recent instances in which parties have sought prior approval from the FTC show that the timeline to obtain prior approval is uncertain and can take several months. Faced with this uncertainty, companies have adopted strategies to avoid entering consent decrees with the FTC or to narrow any prior approval requirements. Given continued, if more limited, support for prior approval provisions by Trump-appointed FTC commissioners, companies whose deals will be reviewed by the FTC are well advised to understand the prior approval process, and may continue pursuing such strategies unless and until the FTC shifts its policy.

I. Background of Prior Approval

For decades prior to the mid-1990s, the FTC's policy was that consent orders entered in merger cases would contain a prior approval provision requiring that the respondent seek the Commission's prior approval for any future acquisition over a *de minimis* threshold within certain markets, for a ten-year period.[3] The FTC imposed these prior approval requirements pursuant to its authority to fashion remedies to prevent the recurrence of anticompetitive conduct.

In June 1995, the FTC rescinded its prior approval policy based on its view that the HSR Act's standard premerger notification requirements provided effective means for investigating anticompetitive transactions before they occur.[4] The change was immediately felt: in *Eli Lilly* (involving a

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[2] Fed. Trade Comm'n, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://bit.ly/4836xl1.

[3] "Consent orders" referenced herein refer to the Decision and Order issued by the court or administrative tribunal at the conclusion of an FTC investigation. Likewise, "consent decrees" refer to the Final Judgment issued by a court at the conclusion of a DOJ investigation. Consent orders and consent decrees are the operative documents containing the prior approval provisions discussed herein.

[4] *See* Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39,745 (Aug. 3, 1995), https://bit.ly/4dEgUNx.

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pharmaceutical company's acquisition of a pharmacy benefits manager) the FTC published its proposed consent order for public comment before the policy change, including a prior approval provision, but by the time the comment period expired, the no-prior-approval policy had come into effect. The final consent order, entered in July 1995, contained no such provision.[5] In the months following the FTC's policy shift, dozens of companies petitioned the FTC to reopen their consent orders and set aside the prior approval provisions.[6] In most cases, the FTC granted the petition following a public comment period.[7] Although the vast majority of FTC consent orders prior to June 1995 had prior approval obligations, none of the FTC's consent orders issued in the last six months of 1995 did.

Notably, the FTC's policy shift was never a wholesale abandonment of prior approval.

Notably, the FTC's policy shift was never a wholesale abandonment of prior approval. For example, Coca Cola, which at the time had been in a long-running dispute with the FTC over its attempt to purchase its rival the Dr Pepper Company, petitioned the FTC to set aside the prior approval but was unsuccessful.[8] In other cases, the FTC narrowed existing prior approval obligations or modified them to less-burdensome prior notice requirements but did not delete them.[9]

In 2021, the FTC again reversed course, announcing that it was returning to the pre-1995 policy of including prior approval requirements in consent orders.[10] The FTC stated it would routinely require merging parties who enter consent orders with the agency to obtain prior approval from the Commission before closing any future transaction affecting any relevant market in which a violation was alleged, for a minimum of ten years.[11] According to the FTC, prior approval would respond to "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" and lessen the drain on FTC enforcement resources.[12] So far, the FTC has closely hewed to the new policy and has required prior approval provisions in several consent orders. Unlike the 1995 policy shift, the FTC has not attempted to retroactively modify existing consent orders to comply with the 2021 policy.

Two recent Consent Orders shed light on the FTC's approach to prior approval under the current Trump administration. In *Welsh Carson*, which involved multiple acquisitions of anesthesia providers in areas of Texas, the FTC implemented prior approval and prior notice provisions into

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5 *See Eli Lilly and Co.*, 120 F.T.C. 243 (1995).

6 In July 1995, the FTC released a list of 98 companies subject to FTC prior approval obligations, and who may petition the FTC to set aside the provision in their consent order. Press Release, Fed. Trade Comm'n, FTC Releases List of Companies Required to Obtain FTC Approval Prior to Acquiring Certain Assets (July 25, 1995), https://bit.ly/3CE7iFP.

7 The FTC operated "on the presumption that the public interest requires modifying prior-approval provisions in outstanding merger orders to follow the new policy." Press Release, Fed. Trade Comm'n, FYI: MTH Holdings, Inc. Petitions FTC to Reopen and Set Aside Provisions of 1989 Consent Order (Nov. 7, 1995), https://bit.ly/4eLxYBI.

8 *See* Press Release, Fed. Trade Comm'n, Announced Actions for February 2, 1996 (Feb. 2, 1996), http://bit.ly/3ZecAk7.

9 *Id.* (narrowing the geographic scope of Charter Medical Corporation's prior approval obligations); Press Release, Fed. Trade Comm'n, FTC Has Ended the Obligation of Roche Holding Ltd. to Obtain Prior Approval (Jan. 19, 1996), https://bit.ly/3AT7Wic (replacing a prior approval requirement with prior notice requirement); Press Release, Fed. Trade Comm'n, FTC Has Ended Obligation of Boston Scientific Corporation to Obtain Commission Approval (Jan. 16, 1996), https://bit.ly/40YojEO (same). Prior notice requires the parties to inform the agency of a planned transaction (including otherwise non-reportable transactions) and wait some period of time before closing, typically 30 days. During this time the burden is on the agency to engage with the parties; if the agency takes no action then the parties are free to close after the specified waiting period.

10 *See* 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://bit.ly/4h1gjZ2.

11 Statement of the Commission, *supra* note 2.

12 FTC Press Release, *supra* note 10.

the Consent Order.[13] The FTC's complaint involved monopolization as well as Section 7 claims, and the Consent Order provided:

> **III. Future Investment in Anesthesia Businesses**
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> **IT IS FURTHER ORDERED** that:
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> Without prior approval of the Commission using the approval process outlined in 16 C.F.R. § 2.41(f):
>
> 1. No WCAS Party shall invest in or acquire any ownership interest or any other interest, in whole or in part, in any Anesthesia Business in the United States; and
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> 2. No Controlled Anesthesia Business shall invest in or acquire directly or indirectly, through subsidiaries or otherwise, any ownership interest or any other interest, in whole or in part, in any Anesthesia Business that does business in the same state or MSA as the acquiring Controlled Anesthesia Business or any other Controlled Anesthesia Business or Other WC Anesthesia Business.

> **IV. Future Investment in Hospital-Based Physician Practices**
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> **IT IS FURTHER ORDERED** that:
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> At least 30 days prior to the closing of any Transaction that results in a WCAS Party or a Controlled Hospital-Based Physician Practice acquiring, in whole or in part, a Controlling Interest in any Hospital-Based Physician Practice that operates in the same state or MSA as a Controlled Hospital-Based Physician Practice of the same type, the applicable WCAS Party or Controlled Hospital-Based Physician Practice shall provide Advance Notice by email to the Commission's Office of the Secretary at ElectronicFilings@ftc.gov and the Assistant Director of the Commission's Health Care Division.

The Republican commissioners' concurrences at the time the action was authorized under the Biden Administration may shed some light on their inclusion of prior approval provisions in the Consent Order. They concurred with the action on the basis of the Section 7 claims, noting Section 7's requirement to predict "the likely effects of a transaction before it takes place" and pointing out Welsh Carson's past practice of consolidation and price increases in areas across the country.[14]

The FTC's recent merger Consent Order, in *Synopsys/Ansys*,[15] shows that the current Commission may apply the 2021 Policy Statement in a more limited way than the Commission did

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[13] Decision and Order § III, Welsh, Carson, Anderson & Stowe XI, L.P., FTC Docket No. C-4818 (May 19, 2025), https://bit.ly/3FMXcnR.

[14] Concurring Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak, In the Matter of US Anesthesia Partners/Guardian Anesthesia Matter Number 2010031 (Jan. 17, 2025) https://bit.ly/45MC0ZJ. The analysis accompanying the Conser Order points out that "[p]rior approval and notice provisions can be particularly important for acquisitions that fall below HSR reporting thresholds, like many of those anticompetitive transactions alleged in the Complaint." Analysis to Aid Public Comment at 3 (Jan. 17, 2025) https://bit.ly/3T09tZj.

[15] Decision and Order, Synopsys, Inc., FTC Docket No. C-4820 (May 28, 2025) https://bit.ly/3ZRVXul.

under Chair Khan. *Synopsys/Ansys*, which involved several software tool markets across the U.S., included divestiture requirements but no prior approval requirements for the buyer Synopsys.[16]

Welsh Carson and *Synopsys/Ansys* together suggest that the FTC may continue requiring prior approval provisions, at least in cases where companies present a pattern or practice of acquisitions and price increases.

DOJ publicly recognized its divergence from FTC practice with respect to not just prior approval, but also consent decrees in general, during the 1990s.

In contrast to the FTC, DOJ Antitrust Division consent decrees rarely have contained prior approval provisions, even prior to the 1995 policy shift. Between 1990 and 1995, DOJ entered into twenty-nine consent decrees, only two of which contained prior approval provisions applicable to acquisitions of third party assets.[17] DOJ publicly recognized its divergence from FTC practice with respect to not just prior approval, but also consent decrees in general, during the 1990s. As part of a "top-to-bottom" review of the agency's remedy practices in the early 2000s, a Deputy Assistant Attorney General of the DOJ Antitrust Division pointed to the "FTC's insistence on prior approval clauses in consent decrees" as an example of focusing on the remedies more than the violations, leading to a lack of transparency with respect to the agencies' policy.[18] Consistent with its historical approach, DOJ did not join the FTC in 2021 in stating a plan to require prior approval provisions in its consent decrees.

II. Agency Incorporation of Prior Approval in Consent Agreements

The FTC and DOJ take divergent approaches to prior approval, with the result that whichever agency engages with the parties is critical to evaluating the likelihood and nature of potential prior approval requirements. Since October 2021, when the FTC revised its prior approval policy, there have been twenty-three merger-related consent orders/decrees by DOJ and FTC combined.[19] Nineteen of these involve the FTC, and fifteen of these nineteen FTC orders contain a prior approval provision applicable to the buyer.[20] In other words, fifteen of twenty-three consent orders/decrees since October 2021, or 65% of the total (and 79% of FTC orders), contain prior approval requirements applicable to future acquisitions. DOJ, on the other hand, has focused on either requiring the parties to remedy potentially anticompetitive aspects before closing their deal (the "fix-it-first" approach) or litigating cases in court: of the nineteen DOJ enforcement actions since October 2021, eight deals were abandoned, seven deals were litigated, and one deal cleared

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[16] *See id.*

[17] *See* Final Judgment, *United States v. Motorola, Inc.*, No. 94-2331 (D.D.C. July 25, 1995), https://bit.ly/3NhkO4f, and Final Judgment, *United States v. Primestar Partners, L.P.*, No. 03-cv-3913 (S.D.N.Y. Apr. 4, 1994), https://bit.ly/488gv4U. Like many consent decrees today, DOJ consent decrees in the early 1990s contain prior approval obligations applicable to the divested assets or counterparty and, occasionally, prior notice requirements.

[18] *See* Deborah Platt Majoras, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't Just., Houston, We Have a Competitive Problem: How Can We Remedy It?, Address Before the Houston Bar Association Antitrust and Trade Regulation Section, (Apr. 17, 2002), https://bit.ly/3ZZFuFo.

[19] As of this writing, DOJ's most recent consent decree, in *Keysight /Spirent*, is pending final approval. We have included *Keysight* for purposes of these calculations. *See* Antitrust Div., U.S. Dep't Just., *U.S. v. Keysight Technologies, Inc. and Spirent Communications PLC*, (last visited June 9, 2025), https://bit.ly/45ge0xV.

[20] Note, however, that the FTC includes a prior approval requirement in almost every consent decree where the merging parties have divestiture requirements; consent decrees without prior approval requirements tend to be those without divestiture requirements imposed on the merging parties.

after the parties implemented a fix-it-first remedy, leaving just four cases, none of which had prior approval requirements applicable to future acquisitions, to be resolved through consent decrees.[21]

A. Nature of FTC Prior Approval Orders. The FTC is consistent with respect to the terms it implements into prior approval requirements. In almost every consent order settlement since 2021, the FTC has imposed a ten-year prior approval term. Prior approval provisions apply to the buyer, or to both parties in mergers-of-equals or joint ventures, but never solely to the seller. The provisions are broadly worded to cover outright company or asset acquisitions, as well as acquisitions of indirect interests, less-than-full ownership interests, leasehold interests, or contractual rights to provide relevant products or services. Prior approval provisions are otherwise short, often limited to a single paragraph in a consent order. For example:[22]

> Respondents shall not, without prior approval of the Commission, hold or acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, commission franchise interest, or any other interest, in whole or in part, in any Retail Fuel Business in any Prior Approval Location.

Where prior approvals involve physical sites, such as supermarkets or retail fuel stations, the FTC may require prior approval for acquisitions not just of currently operating sites, but also of sites that operated in the relevant market within a certain period of time (often six months) prior to the acquisition. For example:[23]

> **IT IS FURTHER ORDERED** that Respondents shall not, without the prior approval of the Commission, acquire, directly or indirectly, through subsidiaries, partnerships, or otherwise:
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> A. Any ownership or leasehold interest in any facility that has operated as a Supermarket in a Relevant Area within 6 months prior to the date of such proposed acquisition; or
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> B. Any stock, share capital, equity, or other interest in any entity that owns any interest in or operates a Supermarket, or owned any interest in or operated a Supermarket in a Relevant Area within 6 months prior to such proposed acquisition.

Prior approval provisions often exclude the respondent building or opening new facilities. For example:[24]

> *Provided however*, that Respondents are not required to obtain the prior approval of the Commission for the Respondents' construction or opening of new facilities.

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[21] DOJ's public statements align with its track record. A September 2023 speech by Antitrust Division Assistant Attorney General Jonathan Kanter reinforces the DOJ's aversion to "[p]atchwork quilts of carve-out divestitures, complex merger consent decrees involving extensive entanglements and ongoing dependence between the merged firm and the divestiture buyer" because such remedies "often fail to protect the harm to competition from an otherwise anticompetitive merger." *See* Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks at the 2023 Georgetown Antitrust Law Symposium (Sept. 19, 2023), https://bit.ly/3BBZpjL.

[22] Decision and Order § X, Global Partners LP, FTC Docket No. C-4755 (Mar. 3, 2022), https://bit.ly/3Y2pzmW.

[23] Decision and Order § X, Golub Corp., FTC Docket No. C-4753 (Jan. 20, 2022), https://bit.ly/4h0mrRu.

[24] Decision and Order § X, Tractor Supply Co., FTC Docket No. C-4776 (Dec. 9, 2022), https://bit.ly/3zQbAc6.

The FTC typically scopes its prior approval provisions to mirror the Relevant Area or Relevant Product as defined in the complaint. For example, in *Tractor Supply* the FTC prohibited the merging parties from acquiring farm stores, without prior approval, in any one of 84 localized "Relevant Areas" in which the FTC was ordering divestitures.[25] In *Medtronic*, the FTC imposed prior approval over acquisitions of "any balloon sinus dilation products or ENT navigation systems," the two relevant products defined in the complaint.[26]

The FTC almost always also imposes prior approval obligations on divestiture buyers, limiting their ability to dispose of the divested assets acquired as part of the consent order settlement.

In a few cases, however, the FTC expanded its prior approval requirements to geographies or products beyond the alleged relevant markets.[27] In *JAB/Sage* (2022) and *JAB/Ethos* (2022), which both involved specialty and emergency veterinary services in the U.S., the FTC imposed statewide prior approval requirements despite describing relevant geographic markets as local cities or urban areas.[28] The FTC cited the industry's trend toward increased consolidation, including via acquisitions by JAB that may not be reportable under the HSR Act, as the reason for both consent orders' statewide prior approval requirement and nationwide prior notice requirement.

Similarly, in *DaVita,* which involved the acquisition of kidney dialysis clinics in Utah, the FTC imposed a statewide prior approval requirement despite defining the relevant geographic market for the underlying deal as the "greater Provo, Utah area."[29,30] In *ANI,* which involved the U.S. market for certain generic antibiotics used to treat infections and generic oral steroids, the FTC defined two relevant generic pharmaceutical products in the underlying deal, but expanded its prior approval requirements to cover a third generic product in light of potential future competition between the parties.[31] These examples demonstrate the forward-looking, prophylactic nature of prior approval and the FTC's willingness to scope the requirements accordingly.

The FTC almost always also imposes prior approval obligations on divestiture buyers, limiting their ability to dispose of the divested assets acquired as part of the consent order settlement. These prior approval provisions typically set forth a shorter time period (two to four years) during which the divestiture buyer must seek prior approval before selling the divested assets to anyone, after which prior approval is only required for a sale of divestiture assets to companies operating in the same relevant area (i.e., competitors) until expiration of the consent order. For example, in the *Prince/Ferro* transaction in 2022, involving porcelain enamel frit, glass enamel, and forehearth colorants in North America, the FTC's Order stated:[32]

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[25] *Id.* § X & App. G.

[26] Decision and Order § X, Medtronic plc, FTC Docket No. C-4763 (June 30, 2022), https://bit.ly/4gZ0SR1.

[27] The FTC's pursuit of broader prior approval requirements has largely focused on healthcare mergers. The FTC's apparent concern about broader market effects aligns with its challenge of cross-market healthcare mergers. *See, e.g.*, Christopher Lau & Dina Older Aguilar, *Cross-Market Implications in FTC's Anesthesia Complaint,* Law360 (Nov. 20, 2023), https://bit.ly/3A3OfUd.

[28] *See* Decision and Order § X, JAB/Sage, FTC Docket No. C-4766 (Aug. 2, 2022), https://bit.ly/47YTXTQ; Decision and Order § X, JAB/Ethos, FTC Docket No. C-4770 (Oct. 10, 2022), https://bit.ly/3XRUgve.

[29] *Compare* Complaint ¶ 11, DaVita Inc., FTC Docket No. C-4752 (filed Oct. 25, 2021), https://bit.ly/3TZelP2, *with* Decision and Order § X, DaVita Inc. (Jan. 12, 2022), https://bit.ly/3ZXHn5B ("within the State of Utah").

[30] *See* Analysis to Aid Public Comment at 1 (June 29, 2022), https://bit.ly/4mLSwzn.. (SAGE); https://bit.ly/43PJgkS. (ETHOS)

[31] *Compare* Complaint ¶¶ 6-7, ANI Pharmaceuticals, Inc., FTC Docket No. C-4754 (filed Nov. 10, 2021), https://bit.ly/3YgoLMB, *with* Decision and Order § X, ANI Pharmaceuticals, Inc. (Jan. 12, 2022), https://bit.ly/3NgHH7X.

[32] Decision and Order § XI, Prince/Ferro, FTC Docket No. C-4762 (June 10, 2022), https://bit.ly/3ZTt4in.

XI. Prior Approval for Acquirer

IT IS FURTHER ORDERED that:

A. For a period of 3 years after the Divestiture Date, KPS or any other Acquirer shall not sell, or otherwise convey, through subsidiaries or otherwise, without the prior approval of the Commission, the Prince Business that was divested pursuant to Section II, to any Person; and

B. For a period of 7 years after the term of Paragraph XI.A ends, KPS or any other Acquirer shall not sell, or convey, through subsidiaries or otherwise, without the prior approval of the Commission:

1. the Forehearth Colorant Business to any Person who owns, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or other interest, in whole or in part, in any business that manufactures and sells Forehearth Colorant anywhere in the world;

2. the Glass Enamel Business to any Person who owns, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or other interest, in whole or in part, in any business that manufactures and sells Glass Enamel anywhere in the world; or

3. the Porcelain Enamel Business to any Person who owns, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or other interest, in whole or in part, in any business that manufactures and sells Porcelain Enamel in North America,

Two high profile FTC consent orders involving the oil and gas industry, *Exxon/Pioneer* (2024) and *QEP Partners/EQT* ("*Quantum*") (2023), both lack prior approval obligations applicable to the buyer. *Exxon* contains no prior approval provisions.[33] *Quantum*'s prior approval provisions focused on Quantum, an investor in Tug Hill that was receiving equity consideration in the transaction, rather than on EQT, the buyer in the main transaction.[34] The FTC required Quantum to divest its EQT equity consideration within a certain period of time and prohibited Quantum from acquiring additional EQT shares without prior approval for the term of the order.[35] Neither case involved divestitures of a controlled business, a remedy which often lends itself to prior approval requirements focused on future acquisitions. Rather, the FTC in both cases banned the seller from appointing a representative to the buyer's board of directors, a remedy more closely tied to the alleged harm to competition. Pioneer's former CEO has since petitioned the FTC to reopen and set aside the final consent order in *Exxon/Pioneer*, but as of this writing the FTC has yet to take action.

Finally, while prior approval is the most common forward-looking remedy in consent orders, a less burdensome option is a prior notice requirement. Prior notice requires parties to notify the FTC of a relevant deal but does not require affirmative approval from the agency prior to closing. The FTC imposed a nationwide prior notice requirement in both *JAB* cases in addition to the narrower prior approval requirements.[36]

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[33] *See* Decision and Order, Exxon Mobil Corp., FTC File No. 2410004 (May 1, 2024), https://bit.ly/4ezXYRb.

[34] *See* Decision and Order § VI, QEP Partners/EQT Corp., FTC Docket No. C-4799 (Oct. 10, 2023), https://bit.ly/4ewLJoy.

[35] *Id.*

[36] Decision § XI, JAB/Sage; Decision § XI, JAB/Ethos.

B. DOJ Prior Approval Orders. DOJ, which favored fix-it-first remedies and outright litigation in merger cases under the Biden Administration,[37] entered just three consent decrees since October 2021. None of the DOJ's three decrees entered into since October 2021 contain forward-looking prior approval requirements on the buyer, although DOJ has imposed other traditional prior approval requirements designed to prevent circumvention of the main remedy. In *Neenah/US Foundry* (2022), DOJ's prior approval requirement was limited to reacquisitions of the divestiture assets by either party; prior approval was not required for either party to acquire other assets not part of the original transaction.[38] Similarly, in *S&P Global/IHS Markit* (2022), DOJ imposed prior approval requirements preventing the buyer from entering or extending an exclusive license over GasBuddy, the same product DOJ forced them to divest.[39] The prior approval requirements in both cases were geared more towards ensuring a clean and permanent divestiture rather than preventing future anticompetitive acquisitions. In *Lactalis/Kraft Heinz* (2022), which involved competition in the natural cheese business in the United States, DOJ imposed a prior notice requirement but no prior approval requirement.[40] All three DOJ consent decrees are from October and November 2021, immediately after the FTC issued its updated prior approval policy guidance.

III. The Method for Obtaining Prior Approval

The FTC has provided little guidance on the process for obtaining FTC approval for a transaction subject to prior approval requirements. The FTC Rules of Practice set out general procedures for seeking prior approval of the Commission for proposed acquisitions. The Commission's Rules of Practice state that an application for prior approval "shall fully describe the terms of the transaction or modification and shall set forth why the transaction or modification merits Commission approval."[41] Applications for prior approval will be placed on the public record with a 30 day public comment period unless the Commission decides otherwise.[42] Comments received in response to the application are also placed on the public record, and the applicant as well as any commenters may request confidential treatment of any portion of their submissions.[43]

The process is unlike filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") in four key respects. First, while the FTC has promulgated regulations under the HSR Act, provides a draft form, and specifies the information that must be submitted with the filing, there is no draft form or even specified format or specific set of information that must be included in an application for prior approval. As a result, "filing" an application for prior approval is more akin

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[37] DOJ's current view is that fixing otherwise anti-competitive transactions is not the role of competition enforcers. *See, e.g.*, Bryan Koenig, *Dubious Merger Bid? 'Find A Different Deal,' DOJ Official Says*, Law360 (Apr. 10, 2024), https://bit.ly/493m7xS.

[38] *See* Final Judgment § XI, *United States v. Neenah Enters., Inc.*, No. 21-2701 (D.D.C. Jan. 31, 2022) (ECF No. 12).

[39] *See* Final Judgment § X, *United States v. S&P Global Inc.*, No. 21-3003 (D.D.C. Mar. 21, 2022), https://bit.ly/3YhQqgp. The FTC implemented a similar requirement in *Quantum Partners/EQT Corp.*, prohibiting Quantum's "reacquisition" of EQT voting securities during the term of the consent order.

[40] *See* Final Judgment § XII, *United States v. B.S.A. S.A.*, No. 21-2976 (D.D.C. Mar. 15, 2022), https://bit.ly/4dF0pk7. The DOJ imposed a nationwide prior notice requirement to capture non-reportable acquisitions that it viewed as potentially concerning. See Competitive Impact Statement § III.D, United States v. B.S.A. S.A., No. 21-2976 (D.D.C. Dec. 20, 2021) (ECF No. 4), https://bit.ly/3YZ4wST. The DOJ cited evidence of strong regional variation in ricotta cheese, the relevant product, and a resulting concern that the buyer could acquire one or more strong local or regional providers. *Id.* Similar to the FTC in *JAB*, the DOJ was worried that these roll-up acquisitions may not be HSR-reportable, so the prior notice requirement gave it that opportunity to review.

[41] 16 C.F.R. § 2.41(f)(1).

[42] *Id.* § 2.41(f)(1)-(2).

[43] *Id.* § 2.41(f)(2)-(4).

to making a premerger filing in non-U.S. jurisdictions that have a pre-filing consultation process. That is, a party may proactively reach out to and work with FTC staff to submit a draft of the application, followed by rounds of questions and information requests to refine the application, until the FTC staff determines the application is sufficient to submit for publication in the Federal Register for public comment. Parties may consult the usual HSR form and instructions as a guide to the type of information that the FTC wishes to see but there is no requirement to use the HSR form if the prior approval transaction is not itself HSR-reportable; parties can submit something more akin to a letter or white paper.

Second, there are no timelines set forth for when the application should be made or how long the FTC has to review and act on the application. The pre-filing consultation process described above could take weeks or months depending on the complexity of the transaction and whether the FTC staff has any concerns.

Third, the application is subject to a public notice and public comment—a particularly notable difference from HSR Act filings, which are generally confidential. For example, the petition for prior approval in Sartorius Stedim Biotech S.A.'s proposed acquisition of the chromatography business of Novasep Process SAS ("*Sartorius/Novesep*") is a 35-page document that is more akin to a white paper than an HSR filing.[44] The petition discusses the rationale for the acquisition and the parties' arguments for why the acquisition would be procompetitive.[45] The vast majority of the application was made public, aside from specific revenue and market share numbers, numbers of certain types of employees, and certain product development plans.[46] The petition for prior approval in XCL Resources Holdings, LLC's proposed acquisition of Altamont Energy, LLC ("*XCL-Altamont*"), involving the acquisition of an oil and gas operator in the Uinta Basin, contained similar advocacy.[47] After the petition is finalized and published in the Federal Register,[48] the public comment period is generally 30 days after publication. After the comment period ends, the FTC staff will review comments received and make a recommendation to the Director of the Bureau of Competition and his or her deputies and staff (i.e., the "front office"). Again, there is no set timeline for this recommendation; however, FTC staff typically is transparent about when they have forwarded the application and their recommendation to the front office.

Fourth, the FTC needs to take an affirmative action on the application. In other words, the period to act does not expire if the FTC fails to take action, as it would under the HSR Act or pursuant to a prior notice requirement. "Taking action" on a prior approval application means the front office needs to brief the Commissioners on the application and a Commission vote must be scheduled, which usually takes a minimum of two weeks. After the Commissioners vote on the matter, the FTC's Office of the Secretary issues a letter informing the parties of the Commission's decision.[49] The FTC may issue a press release and publish the letter shortly thereafter.[50]

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[44] *See* Petition for Prior Approval of Sartorius Stedim Biotech S.A.'s Proposed Acquisition of Novasep Process SAS's Chromotography Equipment Business (Oct. 28, 2021), http://bit.ly/49EfbqX.

[45] *Id.*

[46] *Id.*

[47] *See* Petition for Prior Approval of XCL Resources Holdings, LLC's Proposed Acquisition of Altamont Energy, LLC (Mar. 15, 2024), https://bit.ly/3HsWA7o.

[48] Publication in the Federal Register generally takes 2-3 weeks.

[49] *See, e.g.*, FTC Letter, Danaher Corp., FTC Docket No. C-4710 (Jan. 31, 2022), https://bit.ly/3BEOPsd.

[50] *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Approves Sartorius Stedim Biotech S.A.'s Petition for Prior Approval of its Acquisition of the Chromatography Business of Novasep Process SAS (Feb. 1, 2022), https://bit.ly/4dFiazS.

IV. Prior Approval Applications Since the 2021 Policy

Since the FTC's 2021 policy announcement, there have been two transactions in which the buyers applied for the Commission's prior approval: (1) *Sartorius/Novesep*; and (2) *XCL/Altamont*. The timelines for these cases suggest that, even in cases that do not garner negative comments during the comment period, the FTC's prior approval process takes several months to complete.

Although *Sartorius/Novasep*'s prior approval requirement did not stem from having entered a consent order for a prior alleged Clayton Act violation, it was the first acquisition subject to prior approval requirements following the FTC policy statement in 2021.[51] In 2020, the FTC required Danaher Corporation to divest assets as a condition of acquiring General Electric's biopharmaceutical business.[52] Sartorius was the FTC-approved divestiture buyer and agreed to obtain the Commission's prior approval if it proposed to acquire Novasep's chromatography business.[53] Sartorius announced its acquisition of Novasep's chromatography business on January 6, 2021, and the prior approval application was published in the Federal Register over ten months later, on November 18, 2021.[54] The FTC granted prior approval approximately two and a half months later, on January 31, 2022,[55] and issued a press release the following day, on February 1, 2022.[56] From the time of announcement to prior approval, over a year had passed.

The only other instance of a prior approval application following the FTC's policy change is *XCL/Altamont*. XCL's petition stemmed from the Commission's 2022 consent order regarding the acquisition by EnCap Energy Capital Fund XI, L.P. (XCL's parent) of EP Energy Corp.[57] Under the terms of the decree, EnCap and XCL are required to obtain prior approval before acquiring any other producer of waxy crude oil with an output of more than 2,000 barrels per day in the Utah counties of Duchesne, Uintah, Utah, Grand, Emery, Carbon and Wasatch.[58] XCL's application was published in the Federal Register on March 15, 2024.[59] There were seven comments received during the comment period.[60] Two comments were withdrawn, and the remaining five comments expressed support for the transaction. On August 7, 2024, Northern Oil and Gas, Inc. (NOG) announced that it, together with SM Energy Company, was acquiring the Altamont assets simultaneously with purchasing other Uinta Basin assets from XCL.[61] The press release suggests that either prior approval was granted as of August 2024 or that it would be granted by Q4 2024 (the expected closing date of NOG and SM Energy's acquisition of the Altamont Assets). Assuming that

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[51] *See* Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding Grant of Prior Approval Application of Sartorius Stedim S.A. for the Acquisition of Novasep Process SAS (Feb. 1, 2022), https://bit.ly/3XZXmgH.

[52] Press Release, Fed. Trade Comm'n, FTC Approves Final Order Settling Charges That Danaher Corporation's Acquisition of GE Biopharma Was Anticompetitive (May 29, 2020), https://bit.ly/3Yg1A5i.

[53] Sartorius Stedim Press Release, *supra* note 50.

[54] Sartorius Stedim Petition for Prior Approval, 86 Fed. Reg. 64,481 (Nov. 18, 2021), https://bit.ly/3YiOBzU.

[55] Statement of Commissioners, *supra* note 51.

[56] Sartorius Stedim Press Release, *supra* note 41.

[57] Press Release, Fed. Trade Comm'n, XCL Resources Seeks FTC's Prior Approval for Altamont Energy Acquisition (Mar. 7, 2024), https://bit.ly/4gVBVGj.

[58] *Id.*

[59] XCL Petition for Prior Approval, 89 Fed. Reg. 18,939 (Mar. 15, 2024), https://bit.ly/4eTCRsX.

[60] Comments to Petition for Prior Approval of XCL Resources Holdings, LLC's Proposed Acquisition of Altamont Energy, LLC, FTC Docket No. C-4760 (2023), https://bit.ly/3BEPU3f.

[61] Press Release, Northern Oil & Gas, NOG Announces the Exercise of Option to Purchase Additional Uinta Basin Assets, Business Wire (Aug. 7, 2024), https://bit.ly/3zWlZmv.

the FTC granted prior approval soon before the press release, it appears that the prior approval process took at least five months to complete.

V. What Can Companies Do?

Given the timeline to obtain prior approval and the proactive engagement required with FTC staff, agreeing to an FTC consent order with a prior approval provision can be costly. Prior approval is by its nature an *ex ante* restriction on conduct and, therefore, consent orders including prior approval inflict legal compliance costs for the term of provision.[62] Prior approval provisions may apply to transactions that fall below the HSR Act's minimum size-of-transaction reporting threshold (currently $126.4 million), so deals that otherwise would be expected to close quickly are subject to heightened scrutiny and delays. Further, consent orders typically include provisions that state the decree continues to apply to successors. Sellers of entities subject to prior approval orders may see fewer bidders, as buyers may not want to deal with the prior approval process for future M&A activities by the target company.

The prospect of a ten-year prior approval requirement has affected how parties negotiate merger agreements and allocate risk in the transaction process, as well as how parties engage with the FTC on remedies. For example:

- Buyers may explicitly carve out any prior approval requirement from their regulatory best efforts covenants in acquisition agreements, effectively allowing them to walk away from a deal rather than close with a consent order affecting their future M&A activity. This is especially true if the transaction involves core markets or markets where the company is or expects to be a repeat player in the M&A space. Sellers, however, may view such carveouts as an indication that the buyer is unwilling to agree to any remedy with the FTC, since the FTC's stated policy is to routinely require prior approval provisions.
- Buyers may opt to address potential risks by unilaterally addressing the FTC's concern, such as by divesting a party's overlapping assets, to avoid having to sign a consent order. "Fix-it-first" remedies are not new but became more common during the Biden administration both at the FTC and DOJ. A potential disadvantage of a fix-it-first approach is that the buyer may divest more or fewer assets than the FTC would require. If they divest fewer assets than the FTC would require, they may nonetheless face litigation with the agency.
- Buyers that are willing to accept prior approval provisions nonetheless may be able to negotiate meaningful guardrails. For example, buyers may be able to carve out prior approval for HSR-reportable deals that will come before the FTC regardless, thereby avoiding timing uncertainty that comes with a pre-notification consultation period, as well as provision of information potentially outside the scope of the HSR filing.[63] Buyers also may narrow the scope of the relevant market covered by the prior approval provision and thus the number of deals falling under the net of prior approval, either by pushing for narrower geographic markets or narrower product markets.

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[62] In December 2023, the FTC sued 7-Eleven for $77 million in connection with the company's alleged violation of a 2018 consent order requiring 7-Eleven to provide prior notice with respect to acquisitions of retail fuel stations in certain geographies. *See* Complaint, *FTC v. Seven & i Holdings Co.*, No. 23-cv-3600 (D.D.C. filed Dec. 4, 2023), https://bit.ly/40X9cv7. 7-Eleven self-reported the violation to the FTC, and the case remains pending at the time of this writing.

[63] *See, e.g.*, Decision and Order § VI.A.1; QEP Partners/EQT Corp (carving out Quantum's prior approval requirement for certain HSR-reportable acquisitions of EQT voting securities).

Conclusion

The FTC's prior approval process adds additional burden, time, and unpredictability to the merger review process. Buyers must consider not only the likelihood, but also the cost, of getting the deal through merger review, how they will negotiate prior approval with the FTC, and whether the target is worth a potential ten-year prior approval obligation for future deals in the relevant market. We expect more frequent use of fix-it-first remedies, more litigation, and possibly fewer deals as a result of the FTC resumption of its prior approval policy. Still, parties who anticipate which agency will review their transaction, negotiate appropriate contractual protections, and mitigate antitrust risk upfront may be able to avoid the prior approval process altogether. ●