

Committed Capital

BITE-SIZED TAKES ON PE HOT TOPICS

COMMITTED CAPITAL PODCAST SERIES

FTC's New Prior Approval Policy: Impact on Risks and Deal Terms



DECEMBER 9, 2021

Dechert's Antitrust/Competition practice presented "FTC's New Prior Approval Policy: Impact on Risks and Deal Terms," a bite-size episode of the firm's Committed Capital Sidecar Podcast Series. Craig Falls and James Fishkin, antitrust partners in the firm's Washington, D.C. office, discussed the impact of the FTC's recent announcement that it would require merging parties to obtain prior approvals for future deals as a condition to any divestiture consent agreement, or as a remedy when the FTC challenges a deal, even when the parties walk away.

HIGHLIGHTS FROM THE EPISODE

How Does a Prior Approval Requirement Work?

For a minimum of ten years, parties subject to a prior approval requirement must obtain FTC approval for any future deals in the markets covered by the provision. Unlike the merger review process that applies under the Hart Scott Rodino ("HSR") Act: (1) there are no statutory deadlines or rules covering when the FTC must make its decision; (2) the FTC need not prove to a court that the deal is unlawful; and (3) the requirement applies to all deals in the covered industries, even those below the HSR thresholds.

When is the FTC Likely to Seek a Prior Approval Requirement?

The FTC will require prior approvals whenever the parties resolve an FTC concern through a consent agreement involving a divestiture. Prior approvals will also be required before a divestiture buyer can resell divestiture assets. When no consent is possible and the FTC seeks to block a deal entirely, the FTC is likely to seek a prior approval in addition to an injunction blocking the merger. Even where the parties walk away and moot the injunction, the FTC warned that it would still seek a prior approval and advised that parties can reduce the risk of such an order if they abandon deals early – prior to complying with a Second Request.

What is the Scope of the Prior Approval Requirement?

As of the date of this podcast, the FTC has settled three cases following the policy announcement. In each case, the scope of the prior approval requirement was broader than the relevant markets alleged in the complaint, but not substantially so. For example, the FTC required Davita, Inc. to agree to prior approvals for future acquisitions of dialysis clinics anywhere in Utah although the relevant geographic was limited to Provo, Utah. The FTC's policy statement, however, suggested that it would seek broader prior approval requirements based on a variety of factors, including the parties "history of acquisitiveness," indicating heightened risk for platform or roll-up strategies.

How Do Prior Approval Requirements Impact Risks and Deal Terms?

Parties subject to prior approval requirements will be disadvantaged in future deals relative to other bidders that can rely on the statutory HSR process. Buyers thus need to factor in such a risk when considering deals that may be challenged or that may require divestitures to resolve. In addition, because divestiture buyers will now also be subject to prior approval requirements for any sale of the acquired assets in the divestiture order, it may be more difficult to find a suitable buyer for divested assets. Parties are likely to respond to these risks by limiting efforts covenants such that they need not agree to a prior approval requirement or one that is overly broad, litigate in defense of a deal, and/or comply with a Second Request. Or more buyers may seek to file HSR off of a letter of intent prior to any definitive agreement. But as these limitations reduce deal certainty for the seller, they are more likely to trigger requests for reverse break fees.

To hear the episode in full, click [here](#). For all episodes in our series, click [here](#).

dechert.com

Attorney advertising. Prior results do not guarantee a similar outcome.

Dechert
LLP