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By John M. Yun[1]

On October 25, 2021, in a 3-to-2 vote, strictly along party lines, the Federal Trade Commission ("FTC") announced a major policy shift in how the agency will review and settle mergers.[2] Going forward, *all parties* who agree to a merger remedy order, including a divestiture, must also agree with the agency's demand that, for at least a decade, they obtain "prior approval" from the agency before closing a future acquisition within the same relevant market. Further, *buyers* of any divested assets must also agree to a prior approval condition for a minimum of ten years. Finally, the agency "may decide," at its discretion, to apply the prior approval condition even to markets *beyond* those in which the transaction at issue raised competitive concerns.[3]

Those voting in favor of this significant shift in policy offer several justifications. None of these, either individually or in combination, is persuasive. First, the commissioners assert that the policy change should be of little concern because it represents merely a return by the FTC "to its prior practice of routinely requiring merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged."[4] Second, the commissioners claim that "[t]oo many deals that should have died in the boardroom get proposed because merging parties are willing to take the risk that they can 'get their deal done' with minimal divestitures."[5] Third, the commissioners posit that "[c]hallenging anticompetitive mergers—through litigation or settlement—is a resource intensive enterprise that puts pressure on the Commission's limited staff and budget."[6] Fourth, they explain that "[i]ncorporating prior approval provisions in Commission orders reduces the risk that the Commission will not learn of harmful mergers that do not trigger federal antitrust reporting requirements."[7] Below, I address each of these specific justifications.

I. Justification One: Returning Order to Merger Approval

The FTC majority declares that the "2021 Statement" is not a new statement but simply a return to an earlier policy position that the now rescinded "1995 Statement" disrupted.[8] As a factual matter, this is incorrect. As Commissioners Phillips and Wilson detail in their dissent, "the majority goes far beyond restoring the status quo that existed before the FTC adopted its 1995 Policy Statement."[9] The dissenting statement identifies several ways in which the 2021 version expands upon the prior Commission practice, including by requiring a *minimum* of ten years rather than a *limit* of ten

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[2] See Fed. Trade Comm'n, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/public-statements/2021/10/statement-commission-use-prior-approval-provisions-merger-orders (hereinafter the "2021 Statement").

[3] *Id.* at 2 ("In some situations where stronger relief is needed, the Commission may decide to seek a prior approval provision that covers product and geographic markets beyond just the relevant product and geographic markets affected by the merger.").

[4] *Id.* at 1.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] See Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39745 (Aug. 3, 1995) (hereinafter the "1995 Statement").

[9] Dissenting Statement of Commissioners Christine S. Wilson & Noah Joshua Phillips, Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders 2 (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

years,[10] incorporating buyers of divested assets into the scope of the prior approval policy, and giving the FTC the option to super-size the prior approval scope to include markets beyond those of competitive concern in the transaction at issue. As compared with its previous policy, the Commission has given itself a significantly broader power to regulate proposed mergers and acquisitions.

More fundamentally, however, a policy justification based on "we did it before" is a poor one.[11] It appeals to some long-ago authority, which tells us neither whether the action was meritorious at that time nor, certainly, at present.[12] It should go without saying that simply because a government policy had been implemented in the past, this does not by itself indicate that the policy promotes efficiency or is otherwise equitable. One might instead expect the FTC to have presented some evidence supporting its view that the pre-1995 policy had positive effects, or that removing the policy had negative ones. No such evidence is provided. Using similar logic as the "we did it before" justification, one can easily imagine a different set of commissioners in the future to again reverse course, claiming that "we reversed course once before." Such a justification would be just as unconvincing in the future as it is now.

In fact, the logic of the 1995 Statement, which removed the FTC's requirement that pre-approval always be required, would seem to apply at least as strongly today as it did then. At that time, the Commission explicitly considered both the social benefits *and costs* of a uniform one-size-fits-all policy.[13] Further, the Commission cited the effectiveness of HSR Act, which gives the agency sufficient time to investigate and challenge anticompetitive deals.[14] Additionally, there was recognition that the policy change did not do away with prior approval entirely, but rather reserved its use to situations "where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger" or "would, but for an order, engage in an otherwise unreportable anticompetitive merger."[15] These are sensible rationales that balance the interests of the public — including the burden on merging firms — with the agency's mission to prevent anticompetitive mergers.

While not specified in the Commission's 1995 Statement, some of the "costs on a company subject to such a requirement"[16] likely include the difficulties highlighted in 1994 by Philip Bartz.[17] Bartz detailed how prior approval created asymmetries in regulatory burdens, which resulted in competitive imbalances not based on the merits.[18] Further, he cautioned firms and practitioners about the danger of giving "the FTC effective control over significant

[10] On this point, although the Commission had an informal policy to limit prior approval provisions to ten years, the policy was not fixed, and early prior approval provisions (e.g. in the 1960s) could be twenty years or more. See *In re Endicott-Johnson Corp.*, 68 F.T.C. 843, at *1 (1965) (ordering the company to refrain from acquiring similar companies for the next twenty years without prior approval of the commission).

[11] It seems the Commission first used a prior approval provision in *In re Luria Brothers & Co.*, 62 F.T.C. 243, 314 (1963) (Comm'r Anderson writing for the Commission); see also Kelly Signs, *Milestones in FTC History: HSR Act Launches Effective Premerger Review*, FTC COMPETITION MATTERS (Mar. 16, 2015), https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/milestones-ftc-history-hsr-act-launches-effective ("For instance, in some cases where respondents' past merger activity was found unlawful, FTC orders required the respondents to obtain the Commission's prior approval for subsequent mergers." (citing *Luria Bros.*, 62 F.T.C. at 635–38)).

[12] Further, the fact that the Commission has historically followed a practice does not mean the practice is even within the Commission's lawful authority. See *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021) (unanimously holding that the FTC's longstanding practice of seeking equitable monetary relief such as disgorgement under Section 13(b) of the FTC Act is unlawful).

[13] 1995 Statement at 39745 ("Although prior approval requirements in some cases may save the Commission the costs of re-litigating issues that already have been resolved, prior approval provisions also may impose costs on a company subject to such a requirement.").

[14] *Id.* ("Moreover, the HSR Act has proven to be an effective means of investigating and challenging most anticompetitive transactions before they occur.").

[15] *Id.* at 39746.

[16] *Id.* at 39745.

[17] See Philip D. Bartz, *Through the Looking Glass: Prior Approval Clauses in FTC Antitrust Consent Orders*, 8 ANTITRUST 36 (1994).

[18] *Id.* at 36 ("The mere fact that a company needs prior approval from the FTC to make an acquisition . . . can often be a substantial handicap when principal competitors do not have a similar obligation.").

business decisions."[19] Perhaps not surprisingly, according to Bartz, the FTC was less than transparent when it wielded its pre-1995 approval authority.[20] Similarly, Bartz mentioned the uncertainty and "potential for damage" arising from the commission's ability to engage in "a lengthy or uncertain review period."[21] These comments are consistent with the view that administering and adhering to the pre-1995 prior approval regime was costly, opaque, and burdensome.

Accordingly, the FTC majority's appeal here to the supposed halcyon days before 1995 is not really a convincing justification. In 1995, it appears the Commission thoughtfully considered the impact of its prior approval policy and determined a policy change was in the public interest for reasons that are just as sound today as they were then.

II. Justification Two: Disincentivizing Anticompetitive Deals

The majority's second justification for the policy shift is that "[t]oo many deals that should have died in the boardroom get proposed because merging parties are willing to take the risk that they can 'get their deal done' with minimal divestitures."[22] Further, the majority assert that firms are "too willing to roll the dice on an anticompetitive deal because there are few downsides."[23]

As an initial matter, it is unclear how firms can get their anticompetitive deals cleared with "minimal [and presumably inadequate] divestitures" when the FTC is the one reviewing the acquisitions and, when appropriate, negotiating proposed remedies. Further, what the FTC majority characterizes as a willingness by firms to "roll the dice" seems more like a willingness by parties to put the FTC to its proof by demanding that the FTC prove at trial what it might prefer to simply assert. Courts are fully capable of blocking mergers that the FTC deems anticompetitive, and simply because the parties may be willing to demand due process seems hardly an argument for eliminating that option. If a proposed divestiture is insufficient to address the agency's competitive concerns, then the Commission should seek a stronger remedy and litigate if the parties are unwilling to accept it. If an appropriate remedy calls for some form of prior approval, then that should be negotiated on a case-by-case basis as well. In sum, the FTC can address legitimate competitive concerns during its approval process without applying the same settlement "penalty" of an indefinite prior approval order to every type of transaction — especially since not every transaction covered by a prior approval order is "facially anticompetitive."[24]

III. Justification Three: Preserving Agency Resources

The majority's third justification is that prior approval is needed to preserve "agency resources" — as "[c]onducting merger review after a petition for prior approval would allow the Commission to husband its scarce resources without the brinksmanship we encounter during HSR reviews."[25] This appeal to saving agency resources to justify policy decisions seems to be a common theme for the current Commission.[26]

Undoubtedly, merger reviews can be resource intensive for the FTC. If, however, the FTC feels

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[19] *Id.* at 36; see also *id.* at 39 ("[T]he immediate benefits of resolving litigation with the Commission may prove to be of small importance compared to the enduring regulatory effects of a standard consent decree.").

[20] See, e.g. *id.* at 37 ("[U]ntil the FTC produced an administrative record during the judicial review process, neither [of the parties] were aware of the specific factual basis upon which the FTC rejected the failing company defense.").

[21] *Id.* at 39.

[22] 2021 Statement, *supra* note 2, at 1.

[23] *Id.*

[24] *Id.* ("Parties pursuing facially anticompetitive deals should now know that they are at risk of being subject to a prior approval provision.").

[25] *Id.*

[26] On July 6, 2021, during FTC Chair Lina Khan's first week at the agency, Politico reported that the FTC placed a moratorium on staff participating in external events. Khan's chief of staff explained that "[t]he FTC is severely under-resourced and in the midst of a massive surge in merger filings. This is an all-hands-on-deck moment." Leah Nylen, *FTC Staffers Told to Back Out of Public Appearances*, POLITICO (July, 6, 2021), https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386.

a need for more resources, or more time in which to review proposed mergers, then it should ask Congress to implement those changes legislatively[27] — rather than imposing a burdensome policy on merging parties and buyers that is intended to evade the protections provided to the parties by the HSR Act and to chill merger activity overall.

Further, it is not clear that the Commission will actually save agency resources by putting every settled transaction under a prior approval notice. Unless the Commission intends to quickly ban (which would be a draconian policy) or approve (which would be an overly lenient policy that would render the prior approval provision moot), with little serious analysis, all future transactions when parties are under order, agency staff and resources must still be used to assess the competitive effects of each of the future transactions subject to a prior approval order. Additionally, given the choice of subjecting oneself to onerous settlement terms or challenging the FTC in court, merging parties may choose to engage in more litigation rather than less.[28] Relatedly, the parties may try to structure transactions to "fix it first" so as to avoid a consent order or litigation. Further, even if the parties agree to the prior approval policy, Commission decisions on the legality of future transactions covered by the policy still would be subject to judicial review.[29]

Finally, it is also worth noting that firms proposing to merge — particularly larger firms — already pay a hefty fee for the privilege of having their proposed mergers evaluated.[30] It is not as if they are getting a costly review for free.[31] Thus, the HSR Act, even absent the prior approval policy, generates resources for the Commission to help offset the costs of expending agency resources in merger review.

IV. Justification Four: Detecting Anticompetitive Deals Below the HSR Thresholds

The majority's final justification is to reduce "the risk that the Commission will not learn of harmful mergers that do not trigger federal antitrust reporting requirements."[32] Further, "[a]bsent these provisions, the Commission often learns about these deals without sufficient time to investigate and, if necessary, block the transaction."[33]

This justification is particularly odd, as the Commission recently demonstrated that it has no qualms about reopening and litigating mergers that it previously permitted to go

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[27] This is precisely what the FTC did shortly before voting to rescind the 1995 Statement. See FED. TRADE COMM'N, CONGRESSIONAL BUDGET JUSTIFICATION, FISCAL YEAR 2022 (May 28, 2021), https://www.ftc.gov/system/files/documents/reports/fy-2022-congressional-budget-justification/fy22cbj.pdf/ (hereinafter FTC 2022 JUSTIFICATION) (asking for an increase in staff and budget).

[28] See, e.g. J. Mark Gidley et al., *Everybody Needs Prior Approval! – The FTC Revives and Expands an Old Enforcement Tool over a Scathing Dissent*, WHITE & CASE (Nov. 10, 2021), https://www.whitecase.com/publications/alert/everybody-needs-prior-approval-ftc-revives-and-expands-old-enforcement-tool-over ("Be Prepared to Potentially Litigate. In a similar vein to building time into the merger agreement, parties may need to be more prepared at the outset to potentially litigate their deal. Litigation between private parties and the FTC may become more common."); see also 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 2–3 (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf ("As consent negotiations become more difficult, we will have to go to court more—wasting precious taxpayer dollars, and accomplishing less.").

[29] See Bartz, *supra* note 17, at 38 ("If the FTC rejects a prior approval request, *DPSU I* [*Dr. Pepper/Seven-Up Companies, Inc. v. FTC*, 991 F.2d 859 (D.C. Cir. 1993)] and *DPSU II* [*Dr. Pepper/Seven-Up Companies, Inc. v. FTC*, 151 F.R.D. 483 (D.D.C. 1993)] clarify that judicial review initially must be sought in federal district court, not the court of appeals as is the case when there is an appeal from formal FTC adjudication. *DPSU I* further establishes that the standard of review is whether the FTC's decision was, in applying the antitrust laws, arbitrary and capricious.").

[30] The HSR filing fee ranges from $45,000 to $280,000, depending on the size of the transaction. See Fed. Trade Comm'n, *Filing Fee Information* (Mar. 4, 2021), https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information.

[31] For fiscal year 2021, the FTC projected to spend $117.5 million on merger-related activities such as "Premerger Notification," "Merger and Joint Venture Enforcement," "Merger and Joint Venture Compliance," and "Support" (which also includes non-merger support on competition matters). See FTC 2022 JUSTIFICATION, *supra* note 27, at 155. Meanwhile the FTC projects to receive $150 million in HSR filing fees during the same period. *Id.* at 2. Thus, HSR filing fees more than cover the agency expenses on merger-related activities.

[32] 2021 Statement, *supra* note 2, at 1–2.

[33] *Id.* at 2.

forward.[34] As the FTC's recent litigation against Facebook attests, there is nothing in the Clayton Act, including the HSR Act, that prevents the agency from reviewing consummated mergers. Indeed, the Commission has recently begun the practice of explicitly putting parties on notice that if the FTC has not completed its review during the HSR statutory deadlines, then the parties proceed at their own peril.[35]

Additionally, if "under the radar" deals are truly a systematic problem, the solution must come from Congress, which has the sole authority to adjust the HSR thresholds via legislation. Otherwise, it would seem the FTC is exceeding its administrative power by effectively amending the HSR Act. Further, not only would pre-notification and Commission review of every small acquisition be exceedingly costly (to both the Commission and the parties), but the Commission has presented little to no evidence that demonstrates these below-threshold mergers have caused significant harm to competition. Before imposing these costs on firms and taxpayers, there should be more evidence of actual harm.

V. Concluding Thoughts

We can think of merger approval as a two-stage process. In stage one, there is agency review. During this process, the agency and parties attempt to arrive at a common understanding of the relevant market(s) and the competitive issues. If that fails, then there is stage two, which is litigation. At any point, the agency and parties can arrive at a settlement and remedy, which likely involves some divestiture.

Commonly, proposed transactions that warrant agency review involve multiple markets, where only one or a small subset of markets involve significant competitive concerns. For these types of deals, the new policy can have significant bite. With multiple businesses and product lines, merging firms will frequently have at least one overlap. Often, the justification for these deals has no relationship with the overlapping market(s) and the firms are more than ready to divest competing assets in order to get their deal cleared. Yet, like one drop of poison infecting the whole tun of wine, the divestiture of even one product will trigger the Commission's new prior approval policy. Thus, the overlapping market now creates a potentially permanent "tax" on all the parties involved, including the buyer of the divested assets.

The Commission's new prior approval policy nontrivially weakens the parties' due process protections and puts the FTC more into a regulatory position, implicating significant ongoing costs to businesses and to the economy as a whole.[36] Again, while the Commission may defend its new policy as targeted only at "facially anticompetitive deals," the practical effect is to trap both anticompetitive and procompetitive acquisitions in the agency's regulatory net. This increases the cost of merger activity and likely will lead to consequences — whether intended or not — that are detrimental to economic efficiency and overall economic growth.

[34] See Press Release, Fed. Trade Comm'n, FTC Sues Facebook for Illegal Monopolization (Dec. 9, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization ("The complaint alleges that Facebook has engaged in a systematic strategy—including its 2012 acquisition of up-and-coming rival Instagram, its 2014 acquisition of the mobile messaging app WhatsApp, and the imposition of anticompetitive conditions on software developers—to eliminate threats to its monopoly.").

[35] See Press Release, Fed. Trade Comm'n, FTC Adjusts its Merger Review Process to Deal with Increase in Merger Filings (Aug. 3, 2021), https://www.ftc.gov/news-events/press-releases/2021/08/ftc-adjusts-its-merger-review-process-deal-increase-merger.

[36] 2021 Statement, *supra* note 2, at 1.