UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Chair Lina M. Khan

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

Before it adopted the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions, the Federal Trade Commission had generally included "prior approval" provisions in settlement agreements with companies that had attempted an unlawful merger.[1] This "prior approval" provision required companies seeking to merge to show why those follow-on deals would not harm competition or create the same risks that the FTC had previously warned about. Alongside these "prior approval" provisions, the Commission also often included "prior notice" provisions, requiring businesses to report to the FTC even those deals that fell below the Hart-Scott-Rodino reporting thresholds.

The FTC used these "prior approval" and "prior notice" provisions to ensure that the agency was making effective use of its scarce resources. Without the "prior approval" provision, the FTC could spend months reviewing documents, interviewing parties, and thoroughly investigating a merger the agency determined was unlawful; spend additional months drafting a complaint and pursuing judicial or administrative proceedings; spend yet more months negotiating with the companies to enter into a settlement agreement rather than pursue the deal; and then be forced to *re-do* all this work any time the companies attempted a similar acquisition—even though the agency had already previously determined that this type of deal was illegal.

Recognizing that the FTC has broad discretion to fashion settlement agreements so that they remedy and prevent the recurrence of unlawful practices, courts across-the-board held that these prior approval and prior notice clauses were entirely appropriate for the agency to use.[2] Although the 1974 Hart-Scott-Rodino Act required prior notice for some deals, it did not relieve the FTC from having to re-do its work even in cases where the agency had investigated and determined that a merger was unlawful, and deals below the HSR threshold would not be reported. HSR therefore was a complement to, not a substitute for, a prior approval and prior notice policy.

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[1] *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), https://www.ftc.gov/system/files/documents/public_statements/410471/frnpriorapproval.pdf.

[2] *See Abex Corp. v. FTC,* 420 F.2d 928 (6th Cir. 1970), *cert. denied*, 400 U.S. 865 (1970)); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611, 613 (1946); *The Coca-Cola Co.*, 117 F.T.C. 795, 965-67 (1994); *Warner Communications, Inc.*, 105 F.T.C. 342, 343 (1985); *Louisiana-Pacific Corp.*, 112 F.T.C. 547, 566 (1989).

While the use of prior approval was successful at ensuring the FTC was able to use its scarce resources efficiently, the agency—citing costs to industry and the prior notification regime provided by HSR—in 1995 switched course.[3] The 1995 Statement replaced the agency's practice of requiring prior approval as a routine matter and instead now only permitted such provisions where there was a "credible risk" that the merging parties would attempt another anticompetitive deal.

Dissenting from the FTC's decision to move away from these prior approval provisions, minority Commissioner Mary Azcuenaga warned that this shift would incentivize corporations to repeatedly attempt unlawful deals.[4] She wrote that the prior approval requirement is a "simple, direct and limited remedy to prevent recurrence of unlawful acquisitions" and that it "benefits the Commission by conserving public law enforcement dollars."[5] She added, "To the extent that the prospect of the prior approval requirement may deter unlawful acquisitions by a respondent, this would appear to be a benefit. To the extent that the prospect of prior approval may deter unlawful acquisitions by firms that are not under order, this, too, would appear to be a benefit."[6]

The practical effect of the 1995 Statement has been that the FTC has drastically scaled back its use of prior approval provisions. While the 1995 Statement noted that the Commission may use prior approval provisions in situations where there is a "credible risk" the merging parties would do the same or very similar deal, parties challenged by the FTC with proposing an unlawful merger rarely signal an intent to do so again. As a result, the Commission since the 1995 Statement has required prior approval provisions in only a handful of cases.

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.[7] Companies have also in several cases sought to buy back assets that the Commission ordered those same companies to divest.[8] Without a prior approval provision, the

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[3] *See supra* note 1 ("In light of its now extensive experience with the HSR Act, the Commission has reassessed whether it needs to continue regularly to impose prior approval requirements. 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. Moreover, the HSR Act has proven to be an effective means of investigating and challenging most anticompetitive transactions before they occur.").

[4] *Dissenting Statement of Commissioner Mary L. Azcuenaga on Decision to Abandon Prior Approval Requirements in Merger Orders*, 60 Fed. Reg. 39746-47 (Aug. 3, 1995).

[5] *Id.*

[6] *Id.* at 39,747.

[7] *See, e.g., FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. June 30, 1997) and *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. May 16, 2016); Houghton/D.A. Stuart, FTC File No. 081-0245 (July 14, 2010), https://www.ftc.gov/news-events/press-releases/2010/07/houghton-international-agrees-sell-aluminum-production-assets and Houghton/Quaker/Houghton, FTC File No. 171-0125 (July 23, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-conditions-quaker-chemical-corps-acquisition-houghton.

[8] *See, e.g.,* Valero/Kaneb, FTC File No. 051-0022 (June 5, 2005), https://www.ftc.gov/news-events/press-releases/2005/06/ftc-orders-significant-divestitures-clearing-valeros-acquisition and Valero/Plains, FTC File No.

Commission must initiate a whole new investigation and then go into court to block the deal anew. This additional burden drains the already strapped resources of the Commission.

Prior approval and prior notice provisions have routinely been upheld by courts as lawful fencing-in remedies. The Department of Justice also routinely bars merging parties from reacquiring assets ordered to be divested.[9] The FTC, by contrast, uses no such bar as a general matter. Comments submitted to the agency under former Chairman Simons showcased support for these provisions, particularly from state attorneys general who recommended the FTC re-adopt prior approval and prior notice provisions in digital markets.[10]

The FTC is a significantly under-resourced agency, tasked with enforcing antitrust and consumer protection laws economy-wide—even as its staff count remains roughly 50 percent less than it was in 1980.[11] A recent surge in merger filings is stretching these resources even further, resulting in an enormous burden on the agency staff.

For these reasons, I propose that the Commission rescind the 1995 Statement Concerning Prior Approval and Prior Notice Provisions. If the Statement is rescinded, the Commission will employ prior approval and prior notice provisions based on the facts and circumstances of the proposed transaction, including when the structure of the industry and the concentration of the market call for it. And I would look forward to working with my fellow Commissioners and the agency staff to carefully craft the processes and procedures by which we will use this tool.

I urge my colleagues to support this rescission so that we may better protect the public from unlawful mergers and acquisitions.

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161-0220 (parties abandoned deal after California Attorney General's office challenged acquisition, *see* https://oag.ca.gov/news/press-releases/attorney-general-becerra-valero%E2%80%99s-abandoned-takeover-independent-petroleum).

[9] *See, e.g.,* Section XII. Limitations on Reacquisitions, Proposed Final Judgment, United States v. Zen-Noh Grain Corp., and Bunge North America, Inc., Civil Action No. 1:21-cv-01482 (D.D.C. filed June 1, 2021), https://www.justice.gov/opa/pr/justice-department-requires-substantial-divestitures-zen-noh-acquisition-grain-elevators.

[10] *Public Comments of 43 State Attorneys General, Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century,* at 18-9 (June 11, 2019), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2019/Press/Comment_Submitted_by_National_Association_of_Attorneys_General.pdf.

[11] *See FTC Appropriation and Full-Time Equivalent (FTE) History*, Fed. Trade Comm'n, https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation (last visited on July 21, 2021).