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Buyers Beware: FTC Policy Change Brings Back Prior Approval Provisions

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The Federal Trade Commission ("FTC") flexed its regulatory authority over merger deals with a new policy announced October 25, 2021, requiring prior approval provisions in divestiture orders going forward—a significant albeit not surprising policy change.[1] This is because a few months earlier, the FTC voted to rescind a policy statement in effect since 1995 that generally discouraged prior approval requirements in agency decisions.[2]

Notably, although the 1995 policy statement did not *prohibit* the inclusion of prior approval provisions, the FTC's Official Statement suggests the agency's conduct had been "limited" by the decades-old policy and with its rescission "the Commission returns now 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." According to the FTC, resumption of prior approval provisions serves several of the agency's regulatory interests:

- → Preventing facially anticompetitive deals;
- → Preserving FTC resources;
- → Detecting anticompetitive deals below the Hart-Scott-Rodino (HSR) thresholds.

Not surprisingly, this policy shift is already impacting the health care industry. Denver-based DaVita, Inc., a multi-billion dollar company providing kidney care throughout the United States and internationally, is the subject of a proposed order of the FTC strictly limiting future merger opportunities for the health care giant as a result of its planned acquisition of the University of Utah Health's dialysis clinics.[3] According to the FTC, DaVita has a "history of attempting to buy up competing dialysis clinics in an industry that is already highly concentrated." The FTC has described this as a "big concern," particularly in light of the limited number of nephrologists available to practice in outpatient clinics, which increases the potential for anti-competitive labor activities. The labor concern is just one of several

addressed in the proposed resolution of DaVita's acquisition. The FTC is also requiring DaVita to divest itself of three dialysis clinics in the Provo, Utah-area, prohibiting certain employment practices for a period of time, and requiring DaVita to obtain prior approval before attempting to acquire any new ownership interests in similar facilities anywhere in the State of Utah for a period of ten (10) years.[4]

According to the FTC's complaint[5] against DaVita, it considered the following factors concerning as to the proposed acquisition involving the University:

- → There are only three providers of outpatient dialysis services in the greater Provo, Utah area.
- → The acquisition would eliminate actual, direct, and substantial competition between dialysis clinics owned by DaVita and dialysis clinics owned by the University of Utah Health, and would tend to create a monopoly.
- → It is unlikely new competitors in the greater Provo area will enter.
- → This consolidation could have life-threatening impacts on patients receiving dialysis services.

The FTC's view of DaVita's growth strategies is unflattering at best—and a close eye will continue to follow the company as the FTC believes the ordered restrictions are needed to allow it to "quickly identify and ultimately prevent future facially anticompetitive deals by DaVita, a particularly acquisitive company."

While the response to DaVita's plans is interesting, the size of scope of its operations are quite large and the FTC's response is similarly sized in scope. That said, the health care industry and providers both big and small should take note of the FTC's express intention to no longer principally rely on the premerger notification requirements of the Section 7A of the Clayton Act (a/k/a HSR[6] filings) to identify merger activities for investigation by entities previously subject to allegations of anticompetitive behavior. This means that the landscape of potentially reviewable transactions has broadened beyond the threshold limits of the HSR Act. Also worth noting is the stretch to the FTC's prior approval provisions, as historically the language of the prior approval provision was typically focused on the market relevant to the transaction assessed by the FTC, whereas the prior approval condition imposed in the DaVita order widens the net to include the entire State of Utah.

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[1] https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf

[2] Statement of Federal Trade Comm'n Policy Concerning Prior Approval and Prior Notice Provisions, 60 Fed. Reg. 39745-46 (Aug. 3, 1995).

[3] https://www.ftc.gov/system/files/documents/cases/davita_acco_9_29_final.pdf

[4] https://www.ftc.gov/system/files/documents/cases/davita_order_9_24_final.pdf

[5] https://www.ftc.gov/system/files/documents/cases/complaint_6.pdf

[6] Section 7A of the Clayton Act sets for the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.