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# FTC Will “Routinely” Require Prior Approval Provisions in Merger Orders

The FTC issued a statement<sup>1</sup> intended use of prior approval provisions for future transactions in merger orders. Companies may become subject to these orders either by consent or after an FTC administrative proceeding. The FTC has not said what standard it will use in determining whether to grant approval. The DOJ has not announced a similar policy.

The FTC will require these companies to agree to prior approval requirements for future transactions involving those assets. Companies that propose to engage in transactions covered by these provisions could face an FTC approval process that is significantly more burdensome than the Hart-Scott-Rodino (HSR) Act merger review process.

"substantially similar to a transaction that was previously challenged" by the FTC. A transaction involves concentrated markets "or has seen significant consolidation in the previous ten years"; the transaction "significantly increases concentration"; when "one of the parties likely had market power"; when either party as a history of acquisitiveness; and when there is evidence of anticompetitive market dynamics."

- f Deals involving parties to abandoned transactions. If the parties abandon their transaction after the issuance of an FTC complaint, the FTC might seek prior approval provisions. In determining whether to do so, the FTC will take into account factors listed above. This could give rise to a situation in which the FTC prevails in obtaining a preliminary injunction in federal court and, as is often the case that happens, the parties abandon the transaction but the parties nevertheless end up having to litigate an FTC administrative proceeding. This scenario unfolded at least once in the late 1980s and early 1990s.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Joseph J. Bial  
+1 202223-7318  
[jbial@paulweiss.com](mailto:jbial@paulweiss.com)

Andrew C. Finch  
+1 212373-3417  
[afinch@paulweiss.com](mailto:afinch@paulweiss.com)

Jacqueline P. Rubin  
+1 212373-3056  
[jrubin@paulweiss.com](mailto:jrubin@paulweiss.com)

Charles F. Rick Rule  
+1 202223-7320  
[rrule@paulweiss.com](mailto:rrule@paulweiss.com)

Aidan Synnott  
+1 212-373-3213  
[asynnott@paulweiss.com](mailto:asynnott@paulweiss.com)

Daniel J. Howley  
+1 202223-7372  
[dhowley@paulweiss.com](mailto:dhowley@paulweiss.com)

Marta P. Kelly  
+1 212373-3625  
[mkelly@paulweiss.com](mailto:mkelly@paulweiss.com)

Jared P. Nagley  
+1 212373-3114  
[jnagley@paulweiss.com](mailto:jnagley@paulweiss.com)

Yuni Yan Sobel  
+1 212373-3480  
[ysobel@paulweiss.com](mailto:ysobel@paulweiss.com)

Practice Management Attorney Mark R. Laramie contributed to this Client Memorandum.