

FTC Sharpens Focus on Private Equity

June 17, 2022

On June 13, 2022, the Federal Trade Commission's ("FTC") five commissioners aired their ideological differences over the regulation of private equity-backed consolidation and the tools used to police such deals via a consent agreement settling the FTC's challenge to a \$1.1 billion merger of veterinary clinics. The Commission's majority used the consent to impose potentially significant and unprecedented limitations on future acquisitions of related businesses.

The Commission's statements and relief granted in the consent agreement could have far-reaching implications for future private equity acquisitions, particularly roll-up strategies.

FTC Settles with JAB on Veterinary Clinics Acquisition

Monday's consent agreement settles an FTC complaint issued earlier this month which had challenged as anticompetitive JAB Consumer Partners' acquisition of SAGE Veterinary Partners, LLC. SAGE Veterinary Partners owns and operates 16 veterinary clinics offering specialty and emergency care in Texas, California, Washington and Alaska, while JAB owns two veterinary clinic chains offering general, specialty and emergency care.¹

As part of the consent agreement, JAB is required to:

- Divest six clinics in markets in California and Texas considered by the FTC to be "highly concentrated."

¹ Complaint, JAB Consumer Partners SCA SICAR et al, FTC Docket No. C-4766 (June 3, 2022). Available here: https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEComplaintPublic.pdf.

- Seek prior approval from the FTC for any acquisition over the next 10 years of a specialty or emergency veterinary clinic if it is located within 25 miles of a JAB-owned veterinary specialty or emergency clinic in California or Texas.
- Provide the FTC over the next 10 years with prior notice for any acquisition of a specialty or emergency veterinary clinic located within 25 miles of a JAB-owned veterinary specialty or emergency clinic *anywhere* in the United States.²

In a statement, FTC Chair Lina M. Khan noted that this nationwide prior notice requirement is “the first of its kind in a commission order” and will provide the FTC with “advance notice of any unreported purchases that would ordinarily escape [its] review, providing the agency with the opportunity to investigate those transactions before they are consummated.”³ Notably, JAB’s future acquisitions need not be HSR reportable to trigger the notice and approval requirements under the consent agreement.

Focus on Private Equity

In addressing the settlement, the FTC’s Democratic-appointed majority was clear that private equity firms are prime targets for prior notice and approval provisions in light of their propensity for roll-up acquisitions, a model those FTC commissioners believe is being used to increase concentration while evading HSR scrutiny:

Provisions like the ones in this matter will also allow the FTC to better address stealth roll-ups by private equity firms like JAB/NVA and serial acquisitions by other corporations. Antitrust enforcers must be attentive to how private equity firms’ business models may in some instances distort incentives in ways that strip productive capacity, degrade the quality of goods and services, and hinder competition. Private equity firms’ playbook for purchasing or investing in companies can include tactics such as leveraged buyouts, which saddle businesses with debt and shift the burden of financial risk in ways that can undermine long-term health and competitive viability. While private equity firms can support capacity expansion and upgrades, firms that seek to strip and flip assets over a relatively short period of time are focused on increasing margins over the short-

² FTC Acts to Protect Pet Owners from Private Equity Firm’s Anticompetitive Acquisition of Veterinary Services Clinics, FTC Press Release (June 13, 2022). Available here: <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-acts-protect-pet-owners-private-equity-firms-anticompetitive-acquisition-veterinary-services>.

³ Statement of FTC Chair Lina Khan joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, In the Matter of JAB Consumer Fund/SAGE Veterinary Partners, Commission File No. 2110140 (June 13, 2022). Available here: <https://business.cch.com/ald/2110140C4766KhanStatement.pdf>.

term, which can incentivize unfair or deceptive practices and the hollowing out of productive capacity. Meanwhile, serial acquisitions or “buy-and-buy” tactics can be used by private equity firms and other corporations to roll up sectors, enabling them to accrue market power and reduce incentives to compete, potentially leading to increased prices and degraded quality.⁴

The Democratic-appointed commissioners cited healthcare as one industry in which private equity firms have been particularly active in recent years, including elder and disability care, anesthesiology, emergency medicine, hospice care, air ambulances and opioid treatment centers. The commissioners noted that private equity’s “focus on short-term profits in the healthcare context can incentivize practices that may reduce quality of care, increase costs for patients and payors, and generate appalling patient outcomes.” According to these commissioners, “[s]trategic use of prior notice and prior approval provisions is one way that the Commission can better track and prevent unlawful acquisitions by private equity firms and other corporations.”⁵

Although the FTC’s two Republican commissioners voted in favor of the JAB consent agreement, they objected to their Democratic colleagues’ rhetoric representing an “evident distaste for private equity as a business model.”⁶ In these commissioners’ view, nothing in the complaint or in the FTC’s investigation justifies the conclusion that private equity firms, by their nature, raise competition concerns or require additional remediation. Moreover, “imposing heightened legal obligations on disfavored groups—including private equity—because of who they are rather than what they have done raises rule of law concerns.” For these reasons, the Republican-appointed commissioners encouraged comments during the public comment period regarding the JAB consent agreement’s statewide prior approval and nationwide prior notice provisions.⁷

The JAB consent agreement and the majority’s rhetoric about private equity continue a particular focus on private equity. In their questions about potential changes to the Horizontal Merger Guidelines, the FTC and the Department of Justice (“DOJ”) asked for public comment as to whether “the guidelines’ approach to private equity acquisitions [is] adequate? If not, what changes should be made?” suggesting private equity acquisitions may be singled out for disparate treatment. Further, in a recent speech on enforcement in the healthcare space, a DOJ antitrust official indicated that the DOJ is

⁴ *Id.*

⁵ *Id.*

⁶ Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, In the Matter of JAB Consumer Fund/SAGE Veterinary Partners, Commission File No. 2110140 (June 13, 2022). Available here: https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEPhillipsWilsonConcurringStatement.pdf.

⁷ *Id.*

analyzing the effects of private-equity healthcare investments, including the use of roll-ups, and whether such transactions blunt competition.

Implications

The FTC has continued to expand use of its [re-instituted prior approval policy](#), as well as its newly created nationwide prior notice obligation, including applying such policies to consent agreements with merging parties and purchases of divestitures from challenged transactions. These policies have important implications for both merging parties and divestiture buyers, particularly private equity firms:

- While the Commission remains divided, its majority is undoubtedly leaning into rhetoric against private equity roll-ups and appears primed to use prior approval provisions to police deals that may otherwise not be HSR reportable.
- Companies should be careful in their marketing and deal materials about disclosing future merger or acquisition aspirations, even in highly fragmented industries.
- Prior approval provisions shift the burden of proof to the merging parties to establish that future transactions are not anticompetitive, a burden the agency would otherwise bear under the Clayton Act. This gives the FTC what amounts to a veto right on future transactions, even those that fall outside the HSR thresholds and regulations.
- Prior notice provisions subject transactions that are otherwise outside HSR thresholds to FTC review akin to the HSR process.
- If the FTC insists on a prior approval or notice provision, firms could be faced with a number of strategic decisions, including weighing the risks to the parties of settling and agreeing to the provision against the likelihood that the FTC would challenge the merger in court if the parties do not agree to settle on those terms.
- If the FTC insists that a divestiture buyer agree to prior approval or notice for any future resale of purchased divestiture assets, private equity divestiture buyers will have to consider the effect of those provisions on their plans for the assets.

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