Updates
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FTC Settlement Highlights More Aggressive Enforcement of Private Equity Acquisitions

The U.S. Federal Trade Commission (FTC) voted 5-0 to issue a complaint and accept a proposed order for public comment regarding private equity fund JAB Consumer Partners SCA SICAR's (JAB) $1.1 billion acquisition of SAGE Veterinary Partners, LLC (SAGE) on June 13, 2022. Despite a unanimous, bipartisan vote to resolve a handful of competitive overlaps, public statements from the FTC's three Democrats and two Republicans highlight a significant schism regarding enforcement of private equity acquisitions and prior notice and approval requirements for future transactions.

FTC Chair Lina M. Khan favors a "muscular" approach to regulating private equity. This perspective largely channels the views of former commissioner and current Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra, who previously warned Congress that private equity roll-ups "can quietly increase market power and reduce competition." Assistant Attorney General Jonathan Kanter of the U.S. Department of Justice (DOJ), Antitrust Division has used similar rhetoric, telling the *Financial Times* that private equity business models can be "very much at odds with the law, and very much at odds with the competition we're trying to protect."

In a joint statement from Chair Khan and commissioners Rebecca Kelly Slaughter and Alvaro M. Bedoya on the JAB/SAGE consent order, the FTC's majority cautioned that "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." The three commissioners went on to argue that "serial acquisitions or 'buy-and-buy' tactics can be used by private equity ... to roll up sectors, enabling them to accrue market power and reduce incentives to compete, potentially leading to increased prices and degraded quality."

To address these concerns, commissioners Khan, Slaughter, and Bedoya favor "prior notice and prior approval provisions" to "better track and prevent unlawful acquisitions by private equity firms" and "better address stealth roll-ups by private equity firms." The proposed consent order here requires JAB to (1) divest six clinics in California and Texas, (2) seek prior approval for any acquisition of a veterinary clinic in California or Texas located within 25 miles of a JAB clinic, (3) provide prior notice for any acquisition of any veterinary clinic in the United States located within 25 miles of a JAB clinic, and (4) comply with the prior notice and approval requirements for 10 years.

In a highly critical concurring opinion, commissioners Noah Joshua Phillips and Christine S. Wilson took issue with the "invocation of rhetoric unrelated to competition" in the complaint and the "apparent prediction of remedies upon ... the majority's evident distaste for private equity as a business model, instead of the facts uncovered in the investigation." In particular, the two commissioners disagreed with the majority's reliance on the "growing trend towards consolidation in ... veterinary services markets across the United States" as a basis for "imposing broad prior approval and prior notice requirements." According to commissioners Phillips and Wilson, a national trend toward consolidation is "not an appropriate basis for incremental remedies[,]" such as the decade-long nationwide prior notice requirement imposed here, because the FTC's investigation revealed that competition for veterinary services occurs at the local level, and not nationally. They further argued that the proposed consent order burdens private equity, as a "disfavored group," with "heightened legal obligations ... because of who they are rather than what they have done [and] raises rule of law concerns."

The concurring commissioners also bemoaned that the FTC's "ill-advised Prior Approval Policy" was "almost certain to lead to the routine imposition of prior approval provisions on geographic and product markets beyond those at issue in any given merger." They also cautioned that this policy increases the incentive for "fix-it-first" transactions where the parties divest assets outside of the consent process and therefore without FTC oversight.

Notably, this is not the first time that the two Republican commissioners have lambasted Chair Khan's policies. At the ABA Antitrust Spring Meeting, Commissioner Wilson called out progressive leadership as having a view that "mergers are evil," and Commissioner Phillips referenced an attitude of nihilism among FTC leadership that views mergers as having no value and driving all kinds of societal harm. As reformers seek a broadening of antitrust enforcement to address issues beyond the scope of traditional competitive analysis, this rift between commissioners may widen even further.

Takeaways

- So far, the DOJ and FTC (the agencies) have not brought a merger enforcement action that fails to implicate traditional antitrust issues like the geographic market overlap unanimously recognized in JAB/SAGE. However, that does not mean that the agencies will not bring a case with a more novel or nuanced theory of harm going forward.
- The agencies are using their regulatory leverage to extract additional merger concessions such as the "first of its kind" national prior notice requirement in JAB/SAGE.
- Companies who have repeatedly proposed acquisitions that have been subject to prior consent orders face an increased risk of nontraditional remedies like the broader prior notice and approval requirements in JAB/SAGE.
- The agencies may use the threat or issuance of a Second Request to delay transactions or obtain additional information from merging parties where there is not a traditional antitrust concern, especially in private equity transactions. The reviewing agency may inquire about or request additional information regarding the private equity firm's post-acquisition plans, including roll-up strategies, even where there are no competitive overlaps with the firm's portfolio companies and the target business.
- Roll-up acquisitions by private equity firms and serial acquisitions by other companies often fall below the Hart-Scott-Rodino (HSR) Act's notification thresholds. However, the agencies can and do investigate and seek to unwind nonreportable transactions when they present antitrust concerns.
- Private equity acquisitions of healthcare businesses are likely to receive the most scrutiny and may be where we see a nontraditional antitrust theory. This is especially true for transactions before the FTC, as Chair Khan has suggested that private equity ownership of healthcare facilities leads to reduced quality of care, noting that "private equity ownership of elder care facilities is correlated with increased deaths at those nursing homes, potentially owing to cost-cutting measures like staffing reduction."

Private equity firms should closely follow these developments and prepare for the possibility that enforcers may subject their transactions to increased scrutiny and more onerous remedies.

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