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FTC BITES PRIVATE EQUITY FIRM WITH PRIOR APPROVAL AND PRIOR NOTICE REQUIREMENTS

by Gerald A. Stein

Continuing its assault on the U.S. business community, the Federal Trade Commission ("FTC") recently took a bite out of a proposed \$1.1 billion transaction involving JAB Consumer Partners SCA SICAR's ("JAB") purchase of SAGE Veterinary Partners, LLC ("SAGE"). According to Chair Lina Khan's Statement explaining the FTC's enforcement action, "JAB is a \$55 billion private equity fund whose investments span a host of consumer-facing businesses, from Keurig, Dr Pepper, and Panera Bread to Krispy Kreme and Bally." ([Statement of Chair Lina M. Khan, June 13, 2022](#), citing to JAB Holding Co., Annual Report, at 4 (2021)). According to Chair Khan, expanding into pet care and pet health services, the proposed transaction would combine JAB's existing holdings of Compassion-First Pet Hospitals and National Veterinary Associates ("NVA") to form an entity "that controls nearly 100 specialty and emergency clinics throughout the country." *Id.* The administrative complaint alleged that the proposed transaction would harm competition in certain markets in Texas and California because of JAB's ownership of more than 80 other veterinary clinics.

To address the FTC's concerns, the parties entered into a consent order that required the parties to divest three veterinarian clinics in California and three veterinarian clinics in Texas as a condition to closing. The consent order further imposed "robust prior approval and prior notice requirements on JAB's future acquisitions of specialty and emergency veterinary clinics." (FTC Press Release, June 13, 2022.) Under the FTC's order, "JAB must obtain the Commission's prior approval before acquiring a specialty or emergency veterinary clinic within 25 miles of any then-owned JAB-owned clinic anywhere in California or Texas"—not just the geographic market relevant to the transaction. Moreover, JAB must notify the FTC before "acquiring any specialty or emergency veterinary clinic within 25 miles of a clinic owned by JAB anywhere in the United States that otherwise is not required to be reported under the Hart-Scott-Rodino Act."

The significance of the consent order is less remarkable concerning the required divestitures in markets that the FTC identified with significant overlaps and the potential to harm competition than the punitive prior approval and prior notice requirements that it imposed on JAB because, in the FTC's view, JAB is a bad actor and a chronic antitrust violator. In justifying these draconian prior approval and prior notice provisions, the Commission reasoned that such measures are necessary "because of the growing trend towards consolidation in specialty and emergency veterinary services markets across the country, as well as the likelihood of future acquisitions by JAB in these markets, many of which may be non-HSR reportable." (*See Analysis of Agreement Containing Consent Orders to Aid Public Comment.*)

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Revealing the Commission's motive in imposing the prior approval and prior notice provisions, Chair Kahn explained:

This is not the first time that JAB and its entities have proposed a deal that the Commission alleged was unlawful. In 2020, the FTC brought an action against an earlier acquisition by JAB's entities when JAB first acquired NVA. In the complaint issued in that action, the FTC alleged that JAB's combined ownership of Compassion-First Pet and NVA violated the antitrust laws and ordered JAB to divest three clinics. The entities before us have repeatedly proposed acquisitions that the Commission has had reason to believe would violate the antitrust laws.

(Statement of Chair Kahn, June 13, 2022.)

Chair Kahn justified the prior approval and nationwide prior notice provisions as "one way that the FTC can more closely monitor the potentially unlawful dealmaking activities of companies like JAB/NVA that have repeatedly attempted acquisitions the Commission alleged were unlawful." *Id.* Chair Khan further stated that "[p]rovisions 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." *Id.* Chair Khan concluded that "[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." *Id.*

Although concurring in the decision regarding the divestitures, FTC Commissioners Phillips and Wilson separately issued a scathing statement criticizing the Commission's imposition of the prior notice and prior approval requirements. Explaining their position, Commissioners Phillips and Wilson stated, "we write separately to object to the Complaint's invocation of rhetoric unrelated to competition and the order's apparent predication of remedies upon both that rhetoric and the majority's evident distaste for private equity as a business model, instead of the facts uncovered in the investigation." ([Concurring Statement of Commissioners Phillips and Wilson](#), June 13, 2022.) They first pointed out that the investigation revealed that the relevant competition occurs at the local, not national, level for veterinary services, which is "why the Complaint pleads local markets and the divestitures are designed to resolve overlaps in three specific local areas." *Id.* They also observed that "JAB will hold fewer than 100 clinics nationwide, a competitively-meaningless share of the purported national market." *Id.* Second, Commissioners Phillips and Wilson noted that there was "no evidence" of any alleged trend of collective control of veterinary clinics, and even if one exists, there was no evidence of any "discernible anticompetitive effects." *Id.*

The concurring commissioners criticized the imposition of prior notice and prior authorization as being "untethered to any impact on competition" and a lack of any evidence to indicate that makes JAB's purchase "or any other private equity transaction more likely to raise competition concerns." *Id.* The Commissioners predicted that "the effect of imposing broader prior approval requirements" because of past settlements with the FTC "will be to deter not mergers, but settlements." *Id.*

The current Commission's distaste of transactions involving private equity is now on full display. Parties involved in private equity transactions must be aware that the current Commission views these transactions as presumptively harmful, especially in the area of health care, where it finds a "focus on short-term profits" that "can incentivize practices that may reduce quality of care, increase costs for patients and payors, and generate appalling patient outcomes." (Statement of Chair Khan, *supra*.) Accordingly, private equity firms should prepare for a robust review, and to divest certain assets, and to commit to prior notice and prior approval as a condition for approval of contested transactions.