

FTC Consent Decrees Underscore Skepticism and Scrutiny of Private Equity Firms

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Twice in the past month, the Federal Trade Commission unanimously announced consent decrees that allow recent private equity-sponsored deals to close with some divestitures but also impose prior notice requirements for future acquisitions that are unprecedented in their breadth. The announcements, which come a month after the confirmation of a fifth commissioner gave the Democrats a 3-2 majority on the FTC, are a strong signal of the current Commission's intent to investigate private equity transactions aggressively.

The first decree, announced on June 13, allows private equity fund JAB Consumer Partners SCA SICAR's National Veterinary Associates to buy SAGE Veterinary Partners, LLC, an operator of veterinary clinics.¹ However, the conditions to the remedy were significant:

- To address concentration in northern California and Austin, Texas, JAB will have to obtain prior FTC approval for any new deals involving veterinary clinics within 25 miles of a current JAB-owned clinic in Texas and California.²
- JAB will also have to provide the FTC 30 days' notice before buying any clinics within 25 miles of any clinic that JAB owns throughout the country.³ This is the first time that the FTC has required prior notice of purchases that are outside the relevant market alleged to be impacted by a merger.
- The decision to issue the order was unanimous, but the two Republican Commissioners issued a concurring statement criticizing the Democratic majority for singling out private equity firms in the remedy.⁴

A second consent decree, announced on June 29, allows JAB to complete a \$1.65 billion acquisition of the parent company of veterinary clinic owner Ethos.⁵ Similar to the first deal, the FTC's conditions require JAB to seek prior approval before acquiring specialty or emergency veterinary clinics within 25 miles of a current

¹ Decision and Order, JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, LLC, FTC Docket No. C-4766 (June 13, 2022) (Consent Order),

https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEOrder.pdf.

² *Id.* at § X.

³ *Id.* at § XI.A.

⁴ Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, LLC (Comm'n File No. 2110140) (June 13, 2022) [hereinafter Minority Statement],

https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEPhillipsWilsonConcurringStatement.pdf.

⁵ Decision and Order, JAB Consumer Partners SCA SICAR/MIPW, LLC/Ethos Veterinary Health LLC, FTC Docket No. C-4770 (June 29, 2022) (Consent Order),

https://www.ftc.gov/system/files/ftc_gov/pdf/2110174C4770JABEthosDecisionandOrder.pdf

JAB-owned clinic in California, Colorado, the District of Columbia, Maryland or Virginia.⁶ JAB will also be subject to the same prior notice requirement imposed under the first decree.⁷ Unlike the first deal, the June 29 decree was not accompanied by statements from the commissioners explaining their rationales or concerns for the decision.

The key takeaways from the FTC's decisions are as follows:

- ***The FTC will aggressively investigate private equity acquisitions.*** The investigation into these transactions took almost 12 months and is not the only current investigation of private equity acquisitions. In September 2021, the FTC announced that its Second Requests would consider “how the involvement of investment firms may affect market incentives to compete.”⁸ This investigation—of veterinary clinics in certain local markets— demonstrates the commitment of the FTC to this idea. The agency will certainly take a very close look at private equity transactions that have nationwide impacts.
- ***The current FTC is concerned about roll-ups.*** The majority statement accompanying the June 13 order said that the prior notice and approval provisions would “allow the FTC to better address stealth roll-ups by private equity firms like JAB/NVA and serial acquisitions by other corporations.”⁹ The fact that JAB was pursuing multiple simultaneous acquisitions in the same industry likely increased the scrutiny they received. This is consistent with Chair Lina Khan’s vision statement that “private equity and other investment vehicles” are business models that “distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition.”¹⁰
- ***The majority seeks greater oversight of private equity firms.*** The nationwide advance notice requirement allows the FTC greater insight into private equity transactions. This has been a goal of the majority. Then-Commissioner Rohit Chopra, whom Chair Khan regards as a mentor, wrote in 2020 that the FTC should “closely scrutinize” merger filings by private equity firms to “gain insight on their future acquisitions that may be non-reportable.”¹¹ Chopra also suggested at the time that there could be “changes to the [Hart-Scott-Rodino] Act or its implementing regulations that would help the agency detect harmful roll-up activity.”¹²

⁶ *Id.* at § X.

⁷ *Id.* at § XI.A.

⁸ Holly Vedova, Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave (Sept. 28, 2021), <https://www.ftc.gov/enforcement/competition-matters/2021/09/making-second-request-process-both-more-streamlined-more-rigorous-during-unprecedented-merger-wave>.

⁹ Statement of Chair Lina M. Khan, JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, LLC (Comm’n File No. 2110140) (June 13, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2022.06.13%20-%20Statement%20of%20Chair%20Lina%20M.%20Khan%20Regarding%20NVA-Sage%20-%20new.pdf.

¹⁰ FTC Chair Lina M. Khan, Memorandum re: Vision and Priorities for the FTC (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

¹¹ Statement of Commissioner Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress (Comm’n File No. P110014) (July 8, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsannualreportchopras_tatement.pdf.

¹² *Id.*

- **The DOJ is likely to employ a similar policy.** While Chair Khan and the FTC have acted first, it is clear that the DOJ is also focused on private equity firms that have a business model “designed to hollow out or roll up an industry and essentially cash out” that is “often very much at odds with the law and very much at odds with the competition we’re trying to protect.”¹³
- **The minority is not on board.** The Republican commissioners at the FTC do not support prior approval as a general matter and criticized the Democrats for predicating the remedy not on competition principles but upon “the majority’s evident distaste for private equity as a business model, instead of the facts uncovered in the investigation.”¹⁴

What can private equity firms do to try to mitigate these risks? Here are a few ideas to consider:

- Consider the enhanced antitrust risk to merger agreements. For example:
 - » As buyers, take care before accepting hell or high water clauses, even in the context of what appear to be no-issue deals.
 - » Be sure that merger agreements allow sufficient time for an FTC review.
- In the case of deals that appear to raise risks, consider finding buyers up front rather than waiting for a complete review.
- Be realistic that it will be more difficult for private equity firms to be buyers of assets that the government requires to be sold.
- Be aware that the regulators may place additional scrutiny on private equity firms that have engaged in multiple acquisitions within the same industry.

At least during the time that the Democrats control three seats, private equity firms should be prepared for additional scrutiny. Private equity firms should also be cognizant of other competition issues that may impact them. For example, the FTC and DOJ have been outspoken about “interlocking directorates,” where an individual or company controls board seats on competing companies.¹⁵ Likewise, we believe that the current administration is likely to be substantially more skeptical of private equity firms as buyers of assets that must be divested as part of merger settlements.¹⁶

This stance may be more reflective of current leadership than a permanent policy change. If the Republicans win the White House in 2024, or if more centrist enforcers are appointed to the agencies, private equity firms will likely face less pressure. However, as long as the current leaders of the U.S. antitrust agencies

¹³ Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit, U.S. Dep’t of Justice (Apr. 4, 2022) [hereinafter Kanter Remarks], <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>.

¹⁴ Minority Statement at 1.

¹⁵ Kanter Remarks, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>.

¹⁶ Stefania Palma and James Fontanella-Khan, *Crackdown on buyout deals coming, warns top US antitrust enforcer*, *FINANCIAL TIMES* (May 18, 2022), <https://www.ft.com/content/7f4cc882-1444-4ea3-8a31-c382364aace1>.

remain in power, private equity firms will remain in the crosshairs and should be vigilant about competition compliance.

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