

FTC's Settlement Requires Greater Advance Notice Requirements for Future Transactions in Continued Focus on Private Equity Roll-Up Transactions

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In a recent settlement agreement with JAB Consumer Partners (JAB), the Federal Trade Commission (FTC) continued the trend of increased regulatory scrutiny of private equity “roll-up” transactions (see [here](#) and [here](#)) when it imposed broad prior notice requirements on future acquisitions as a condition to closing JAB’s proposed \$1.1 billion acquisition of SAGE Veterinary Partners, LLC (SAGE).

The FTC claimed that JAB’s acquisition of SAGE would likely be anticompetitive in three localities (Austin, TX; San Francisco, CA; and East Bay, CA) for certain veterinary services. Under the settlement agreement, JAB will be required to divest veterinary clinics in Texas and California and grant the FTC “prior approval and prior notice” rights relating to future acquisitions of veterinary clinics. Specifically, JAB must get prior approval from FTC before “acquiring a specialty or emergency veterinary clinic within 25 miles of any...JAB-owned clinic anywhere in California or Texas” (not just the local markets at issue). This type of preapproval remedy has been reinstituted by the FTC in the Biden administration and is now common in FTC settlements. Further, JAB must also notify the FTC 30 days prior to acquiring any specialty or emergency veterinary clinic within 25 miles of its current clinics *anywhere* in the United States, even if the acquisition would otherwise not be reportable under the Hart-Scott-Rodino Act (HSR). These broad prior approval and prior notice remedies illustrate two key points for private equity firms pursuing roll-up transactions.

First, this settlement continues the trend of antitrust regulators focusing on private equity “roll-up” transactions across a variety of industries and using prior notice settlements to increase policing of such strategies. In a statement supporting the settlement agreement, FTC Chair Lina Khan reiterated her concern with a trend of consolidation in certain industries as a result of private equity firms, and the ways in which they “can be incentivized to engage in roll-up strategies.” Chair Khan also stated that prior approval and prior notice remedies like the ones in this settlement will “allow the FTC to better address stealth roll-ups by private equity firms.” Chair Khan indicated that the broad remedies seen in this settlement could become more common, especially for private equity firms, stating “strategic 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.”

Second, the remedies in this settlement are notable for being unprecedented and controversial. Chair Khan noted that FTC’s requirement for advance notice of all future unreported acquisitions nationwide is “the first of its kind in a Commission order.” She believes that this remedy “ensures that the FTC will have advance notice of any unreported

purchases that would ordinarily escape our review, providing the agency with the opportunity to investigate those transactions before they are consummated.” Chair Khan in part justified the provisions based on the fact that JAB had previously proposed an acquisition that the FTC believed would violate the antitrust laws, and resulted in the divestiture of three veterinary clinics.

The use of these prior notice and prior approval remedies caused dissent among the FTC commissioners. The Republican commissioners issued an unusual concurring statement disagreeing with the nationwide prior approval requirement. They argued that the prior notice requirement is based more upon “the majority’s obvious distaste for private equity” than on clear evidence of any anticompetitive harms resulting from consolidation on a national level and does not support the remedy.

Takeaway

Overall, this settlement agreement should make private equity firms—in particular, those employing roll-up strategies—aware that antitrust enforcers will not only review their transactions more carefully but may also seek to enforce broad prior approval and prior notice remedies that inhibit future transactions in the same space, resulting in additional time and cost to complete transactions. Thus far, the FTC has justified a nationwide notice requirement for future acquisitions only for a single entity following a “roll up” strategy that twice attempted acquisitions the FTC believes violate the antitrust laws. It will be important to follow whether the FTC expands the use of such remedies. Private equity firms will want to involve antitrust counsel in reviewing their transactions to ensure that they will not attract the attention of the antitrust enforcers, thereby opening themselves up to broad restrictions on future transactions.

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