

FTC PUBLISHES SWEEPING CHANGES TO POLICY STATEMENT ON SECTION 5 OF THE FTC ACT, POTENTIALLY OPENING DOOR TO CHALLENGE "ROLL-UPS" OUTSIDE CURRENT ANTITRUST LAW

On November 10, 2022, the Federal Trade Commission ("FTC") issued *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act* ("Policy Statement").¹ In this Policy Statement, the FTC indicates that it can use Section 5 of the Federal Trade Commission Act ("Section 5") to pursue cases that "reach[] beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions." The FTC also moved away from using a *rule of reason* analysis as required under the Sherman Act and U.S. courts. It will instead look to whether the conduct at issue tends to "foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers." Following the release of this new statement, firms, including financial investors, should expect to see the FTC pursue investigations and enforcement actions using Section 5 in situations that do not fit within more traditional antitrust precedents.

SUMMARY OF THE POLICY STATEMENT

As part of the Policy Statement, the FTC declared it would no longer be bound by *rule of reason* analysis, a stark departure from the FTC's 2015 policy statement.² The Policy Statement sets out two elements for identifying conduct that constitutes

¹ Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (Nov. 10, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

² Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (Aug. 13, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

an unfair method of competition under Section 5. First, the conduct must be a "method of competition" made by an actor in the marketplace, and second, the method of competition must be unfair, which is defined as conduct that goes beyond competition on the merits.

The Policy Statement provides examples of what it considers competition on the merits: superior products or services, investment in research and development that leads to innovative outputs, or attracting employees and workers through the offering of better employment terms. It goes on to outline what is unfair competition beyond the merits: conduct involving "coercive, exploitative, collusive, abusive, deceptive, predatory, [] involve[s] the use of economic power of a similar nature . . . otherwise restrictive or exclusionary," and conduct that "tend[s] to negatively affect competitive conditions." The Policy Statement provides examples such as "raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition." The new Policy Statement now looks at "conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers."

Importantly, under the Policy Statement, there is no opportunity for the parties to raise procompetitive justifications. This is a change from the 2015 policy statement which allowed parties to put forward procompetitive justifications, including public policy, cognizable efficiencies, and business justifications.

The FTC voted to approve the Policy Statement 3-1. Commissioner Christine Wilson dissented, finding that the Policy Statement, "resembles the work of an academic or a think tank fellow who dreams of banning unpopular conduct and remaking the economy."³

RELEVANCE FOR PRIVATE EQUITY OR ROLL-UP TRANSACTIONS

With the FTC's broader reach under the Policy Statement, private equity firms, along with large corporations, can expect increased scrutiny. While the FTC provided an expansive list of examples that it now views as violations of Section 5, companies should be aware that the FTC will look at a series of mergers, acquisitions, or joint ventures "that tend to bring about the harms that the antitrust laws were designed to prevent," even if individually the transactions have not violated the antitrust laws. The FTC can review these transactions even if the respondents have not gained full-fledged monopoly or market power or led to a significant increase in market concentration (what the FTC deems to be "incipient violations") and conduct that may not be covered by the language of the Sherman and Clayton Acts (what the FTC deems to be "conduct that violates the spirit of the antitrust laws"). Even if such an acquisition may not substantially lessen competition pursuant to Section 7 of the Clayton Act ("Section 7"), the FTC may argue that the transactions could "ripen" into a violation and, thus, should be prohibited under Section 5.

³ Fed. Trade Comm'n, *Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act"* (Nov. 10, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf.

While the Policy Statement is FTC specific, it aligns with the U.S. antitrust agencies shared skepticism of the effect that the business model of private equity is having on competition.

Assistant Attorney General Jonathan Kanter of the U.S. Department of Justice Antitrust Division commented in May 2022, "Many of the mergers we're confronting are as a result of [private equity] roll ups . . . If we're going to be effective, we cannot just look at each individual deal in a vacuum"⁴

The FTC has made similar remarks. In June 2022, Chair Lina Khan and Commissioners Rebecca Slaughter and Alvaro Bedoya said in a statement, "[S]erial 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"⁵ Director of the Bureau of Competition Holly Vedova also commented, "Private equity firms increasingly engage in roll up strategies that allow them to accrue market power off the Commission's radar."⁶

METHODS OF ENFORCEMENT

In the merger context, the agencies rely on the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, which requires parties to notify the DOJ or FTC of transactions over a certain monetary threshold. For 2022, the minimum threshold is \$101 million. Transactions under this threshold are not reportable, making detection and enforcement in some cases more difficult.

The U.S. agencies can challenge transactions under Section 7, which prohibits mergers that may "substantially [] lessen competition, or [] tend to create a monopoly." Section 7 applies to all transactions, regardless if they are HSR notifiable. Agencies also may bring cause of action under Section 2 of the Sherman Act ("Section 2"), which makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce"

The FTC can bring Section 2 claims under Section 5. Historically, the agencies have not brought many cases under this theory as it requires the government to define the relevant market (both product market and geographic market), and establish that the defendant possesses market power in that relevant market, and that the defendant willfully acquired or maintained that power through unlawful conduct—a difficult burden to prove in court.

The U.S. agencies can also bring Section 2 claims outside of the merger context, along with Section 1 of the Sherman Act ("Section 1"), which prohibits contracts, combinations, and conspiracies that unreasonably restrain trade.

⁴ James Fontanella-Khan and Stefania Palma, *Crackdown on Buyout Deals Coming, Warns Top US Antitrust Enforcer*, Financial Times (May 19, 2022), available at https://www.ft.com/content/7f4cc882-1444-4ea3-8a31-c382364aace1?utm_source=newsletter-hub-wire&utm_medium=email&utm_campaign=pe-hub-wire-subscriber&utm_content=20-05-2022.

⁵ Fed. Trade Comm'n, *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya In the Matter of JAB Consumer Fund/SAGE Veterinary Partners* (June 13, 2022), available at 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.

⁶ Press Release, Fed. Trade Comm'n, *FTC Acts to Protect Pet Owners from Private Equity Firm's Anticompetitive Acquisition of Veterinary Services Clinics* (June 13, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-acts-protect-pet-owners-private-equity-firms-anticompetitive-acquisition-veterinary-services>.

RECENT ENFORCEMENT ACTIONS

On June 3, 2022, the FTC filed a complaint against private equity firm JAB Consumer Partners ("JAB"), the owner of several veterinary clinics. JAB proposed a \$1.1 billion acquisition of competing clinic operator SAGE Veterinary Partners ("SAGE"). The complaint alleged that JAB would violate Section 7 and Section 5 if it acquired SAGE. To alleviate the FTC's concerns, the parties entered a consent decree with the FTC pursuant to which JAB agreed to divest six clinics in California or Texas. The FTC also required JAB to obtain prior approval from the FTC before acquiring any clinics within 25 miles in the same markets in California or Texas for the next 10 years, and provide the FTC prior notice before acquiring any clinics within 25 miles of any existing JAB clinic in the United States for the next 10 years, regardless of HSR reportability.⁷ Later that month, JAB again became the focus of FTC scrutiny when the FTC required JAB to divest clinics in Virginia, Colorado, California, and Washington, D.C. as part of JAB's \$1.65 billion acquisition of Ethos Veterinary Health, LLC. The FTC also required JAB to obtain prior approval before acquiring any clinics within 25 miles of those locations for 10 years.⁸

It has also been reported that the FTC is investigating U.S. Anesthesia Partners ("USAP") in October 2022.⁹ Founded by private equity firm Welsh, Carson, Anderson & Stowe in 2012, USAP is a management service organization with 4,500 anesthesia providers in nine states. The FTC is investigating if USAP has "too much power in some regional markets through acquisitions."

KEY TAKEAWAYS

The Policy Statement departs from decades of FTC guidance and the previous 2015 policy statement. As it was not put out for public comment, as noted in Commissioner Wilson's dissent, antitrust practitioners and companies are left having to wait-and-see how the FTC will enforce Section 5 under the Policy Statement. The Policy Statement concedes that a small acquisition by a company, by itself not illegal, may now be illegal under Section 5 as a "series of mergers or acquisitions." Similarly, the definitions of "coercive, exploitative, collusive, abusive, etc." are not defined, thus potentially leaving room for flexibility in applying Section 5.

It is unknown whether courts will accept the FTC's new positions in the Policy Statement. The departure from precedent, along with the premise that conduct that is not a violation of the Sherman and Clayton Acts would be a violation of the FTC Act, will likely draw heavy skepticism and doubt from judges. It could take some time, however, for a federal judge to hear a standalone Section 5 claim. It seems unlikely that the FTC will bring a standalone Section 5 claim in federal court as a Section 5 claim will likely be tied to a Section 1 or Section 2 claim. It is more likely that the FTC could bring a standalone Section 5 administrative proceeding under 16 C.F.R. Part 3. With an administrative proceeding, a

⁷ *Id.*

⁸ Press Release, Fed. Trade Comm'n, *FTC Takes Second Action Against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm's Rollup of Veterinary Services Clinics* (June 29, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-second-action-against-jab-consumer-partners-protect-pet-owners-private-equity-firms-rollup-of-veterinary-services-clinics>.

⁹ David Michaels, *FTC Probes Market Power of One of Country's Biggest Anesthesia Providers*, *The Wall Street Journal* (Oct. 1, 2022), available at <https://www.wsj.com/articles/ftc-probes-market-power-of-one-of-countrys-biggest-anesthesia-providers-11664644401>.

respondent would have to have a full trial before an Administrative Law Judge, and a subsequent appeal to the full Commission, before it would have the opportunity to appeal to a federal court.

CONTACTS

Timothy Cornell
Partner

T +1 202 912 5220
E timothy.cornell
@cliffordchance.com

Brian Concklin
Partner

T +1 202 912 5060
E brian.concklin
@cliffordchance.com

Peter Mucchetti
Partner

T +1 202 912 5053
E peter.mucchetti
@cliffordchance.com

Leigh Oliver
Partner

T +1 202 912 5933
E leigh.oliver
@cliffordchance.com

Sharis Pozen
Partner

T +1 202 912 5226
E sharis.pozen
@cliffordchance.com

Eva Kurban
Associate

T +1 202 912 5074
E eva.kurban
@cliffordchance.com

Jordan Passmore
Associate

T +1 202 912 5416
E jordan.passmore
@cliffordchance.com

Sung Shin
Law Clerk

T +1 202 912 5505
E sung.shin
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 2001 K Street NW,
Washington, DC 20006-1001, USA

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