PANDEMIC PUPPIES AND PRIVATE EQUITY

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One of the perhaps unexpected consequences of the pandemic is the dramatic increase in pet ownership. Beginning in 2019, but continuing through the pandemic, private equity firm JAB undertook a series of acquisitions of specialty and emergency veterinary clinics--each of which was met by an FTC consent order. While the DOJ's recently revised merger remedies guide suggests that private equity buyers may be preferred to strategic buyers of divested assets in consent agreements, the enforcement rhetoric at both the DOJ and the FTC around private equity acquisitions has since become considerably negative. Private equity is a business model innovation that can allow firms to achieve productivity improvements that are not attainable through other forms of corporate organization. In addition to increased scrutiny of private equity, the FTC has also reintroduced prior approval provisions into merger consent agreements — a pernicious combination that risks the productivity gains private equity brings to small firms in highly fragmented industries such as veterinary services. The recent concerns antitrust enforcers have raised about private equity, that it creates market power, facilitates unfair methods of competition and undermines the competitive viability of acquired firms, are largely unfounded.

I. INTRODUCTION

One of the perhaps unexpected consequences of the pandemic is the dramatic increase in pet ownership. Nearly 20 percent of U.S. households adopted a pet during the pandemic.[2] Pet ownership increased more in 2020 than over the prior twelve years.[3] The increase in pet ownership has led to a sharp increase in demand for appointments at veterinary clinics and long waits for emergency veterinary services.[4] Over the past ten years or so, private equity firms have increasingly taken an interest in veterinary clinics — bringing needed scale and professionalization of management to a highly fragmented industry.[5] Given the pandemic-induced increase in demand for veterinary services, the increase in private equity acquisitions could not come at a more opportune time.

The Federal Trade Commission ("FTC") has taken note of private equity's interest in veterinary clinics — bringing three enforcement actions in the space of three years, beginning in 2020, against JAB Consumer Partners ("JAB") relating to their acquisitions of specialty and emergency veterinary clinics. Since 2020, the antitrust rhetoric surrounding private equity acquisitions has become increasingly negative with leadership at both the FTC and the Antitrust Division of the Department of Justice ("DOJ") calling for more stringent review of PE acquisitions. Assistant Attorney General Jonathan Kanter has said that the private equity "business model is often very much at odds with the law, and very much at odds with the competition we're trying to protect" while FTC Chair Lina Khan notes that regulators need to "improve our tools to go after [private equity acquisitions] in a more muscular way."[6]

The heightened antitrust scrutiny of private equity acquisitions, as evidenced by the enforcement actions against JAB, appears to be pretextual, furthering an antitrust populist agenda, and is not supported by facts or evidence about private equity. The private equity "roll-up" model, which has borne the brunt of enforcers' ire, can increase productivity at small firms largely through increased scale and synergies between the acquired firms. Targeted enforcement against private equity risks the benefits the roll-up model brings to highly fragmented industries. In addition to increased scrutiny of private equity, the FTC has also reintroduced prior approval provisions into merger consent agreements. On their own, prior approval provisions are problematic but, to make matters worse, these provisions are most burdensome to the small firms that would see the largest productivity gains from the PE roll-up model. The unwarranted attack on private equity combined with the reinstitution of prior approval is particularly pernicious and harms business model innovation and economic growth.

II. FTC ACTIONS AGAINST JAB

Beginning in 2019, JAB undertook a series of acquisitions of specialty and emergency veterinary clinics — each of which was met by an FTC consent order. JAB first sought to acquire National Veterinary Associates ("NVA").[7] NVA was owned by a private equity firm at the time of the proposed acquisition by JAB.[8] In order to resolve competitive concerns with the transaction, the FTC required the divestiture of three clinics to

2 American Society for the Prevention of Cruelty to Animals, *New ASPCA Survey: Vast Majority of Dogs and Cats Acquired During Pandemic Still in Their Homes* (2021), https://www.aspcapro.org/resource/new-aspca-survey-vast-majority-dogs-and-cats-acquired-during-pandemic-still-their-homes.

3 Debbie Phillips-Donaldson, *Insights on Pet Ownership Changes, Impact on Pet Food*, PETFOODINDUSTRY.com (Apr. 16, 2021), https://www.petfoodindustry.com/blogs/7-adventures-in-pet-food/post/10204-insights-on-pet-ownership-changes-impact-on-pet-food.

4 Jacob Bogage, *Americans Adopted Millions of Dogs During the Pandemic. Now What Do We Do with Them?* Washington Post, Jan. 7, 2022, https://www.washingtonpost.com/business/2022/01/07/covid-dogs-return-to-work/.

5 Deborah Balshem, *PE Firms Still Drooling Over Veterinary Practice Management Space*, FORBES, May 7, 2018, https://www.forbes.com/sites/mergermarket/2018/05/07/pe-firms-still-drooling-over-veterinary-practice-management-space/?sh=2648348078af.

6 James Fontanella-Khan, *Private Equity Moves into the Antitrust Spotlight*, FIN TIMES, May 23, 2022, https://www.ft.com/content/f222e618-dc96-4204-8a27-00e0a9316236; Stefania Palma et al., *Lina Khan Vows 'Muscular' U.S. Antitrust Approach on Private Equity Deals*, FIN TIMES, June 9, 2022, https://www.ft.com/content/ef9e4ce8-ab9a-45b3-ad91-7877f0e1c797.

7 *Compassion-First Owner to Acquire National Veterinary Associates*, TODAY'S VETERINARY BUS. (June 17, 2019), https://todaysveterinarybusiness.com/compassion-first-owner-to-acquire-nva/.

8 Press Release, Ares Mgmt. and JAB Investors, Ares Management Agrees to Sell NVA, the Leading Independent Veterinary Platform, to JAB Investors (June 17, 2019), https://www.businesswire.com/news/home/20190617005249/en/Ares-Management-Agrees-to-Sell-NVA-the-Leading-Independent-Veterinary-Platform-to-JAB-Investors.

MedVet.[9] MedVet is another private equity-backed operator of specialty and emergency veterinary clinics.[10] The consent order, which became final in 2020, contained a prior notice provision requiring JAB's parent, Agnaten, to notify the commission in advance of any future veterinary clinic acquisitions in certain geographic areas.[11]

In 2021, JAB agreed to acquire SAGE Veterinary Partners ("SAGE") — a private equity-backed operator of specialty and emergency veterinary clinics.[12] As with the prior acquisition, the FTC required divestitures to resolve competitive concerns with the transaction. In this case, JAB was required to divest six clinics to United Veterinary Care ("UVC").[13] UVC is a private equity-backed operator of veterinary clinics.[14] In addition to these divestitures, the FTC's order, which became final on August 2, 2022, imposed extensive prior notice and prior approval conditions on both JAB and UVC. The order requires JAB to obtain "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* [emphasis in original]" despite the relevant geographic areas of concern being limited to the San Francisco Bay area and Austin. In addition to this prior approval requirement, the order also requires JAB to provide prior notice for any acquisition of a "specialty or emergency veterinary clinic within 25 miles of a clinic owned by JAB *anywhere in the United States* [emphasis in original]." The order also requires UVC to obtain prior approval prior to selling any of the assets acquired under the order.[15]

Finally, just weeks after reaching an agreement to acquire SAGE, JAB agreed to acquire Ethos Veterinary Health — a private equity-backed operator of specialty and emergency veterinary clinics.[16] To resolve competitive concerns with this acquisition, the FTC required relief similar to that which was required with the SAGE acquisition. JAB was required to divest three clinics to UVC and two clinics to Veritas Veterinary Partners ("Veritas").[17] Veritas is a private-backed operator of specialty and emergency veterinary clinics.[18] The FTC's order, which is not yet final, imposed similar statewide prior approval requirements for JAB acquisitions in California, Colorado, the District of Columbia, Maryland, and Virginia despite the relevant geographic areas of concern being limited to San Francisco, Denver, the D.C. metro area, and Richmond, VA. The order also imposed a nationwide prior notice requirement on JAB and prior approval requirements on UVC and Veritas.[19]

III. ENFORCERS' CONCERNS ABOUT PRIVATE EQUITY ACQUISITIONS

While the DOJ's recently revised merger remedies guide suggests that private equity buyers may be preferred to strategic buyers of divested assets in consent agreements, the enforcement rhetoric around private equity acquisitions has since become considerably negative.[20] Former FTC Commissioner, now Consumer Financial Protection Bureau Director, Rohit Chopra began raising concerns about private equity acquisitions as early as 2018. He noted in a public statement accompanying the FTC's and DOJ's annual report to Congress on the Hart-Scott-Rodino Act

9 FTC, *Analysis of Agreement Containing Consent Orders to Aid Public Comment* In the Matter of Agnaten SE, Veterinary Specialists of North America, LLC, and NVA Parent Inc. File No. 191-0160, C-4707 (Feb. 14, 2020), https://www.ftc.gov/system/files/documents/cases/cf-nva_analysis_to_aid_public_comment_-_final.pdf.

10 Press Releases, MedVet, MedVet Secures Investment Supporting Continued Growth in Specialty Healthcare for Pets (July 15, 2019), https://www.medvetforpets.com/news/medvet-secures-investment-supporting-continued-growth/.

11 FTC, *Decision and Order* In the Matter of Agnaten SE, Veterinary Specialists of North America, LLC, and NVA Parent Inc. File No. 191-0160, C-4707 (Apr. 9, 2020), https://www.ftc.gov/system/files/documents/cases/1910160c4707agnatennvaorder.pdf. The specific geographic areas are not listed in the public version of the order.

12 Sarah Pringle, *Chicago Pacific Founders' SAGE Veterinary Goes to NVA for $1.25bn*, PE HUB, June 23, 2021, https://www.pehub.com/chicago-pacific-founders-sage-veterinary-goes-to-nva-for-1-25bn/.

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

14 Press Release, Nordic Capital, Nordic Capital Partners with United Veterinary Care, Acquiring Atlantic Street Capital's Shareholding in the Fast-Growing U.S. National Group of Primary, Specialty and Emergency Veterinary Practices (Apr. 23, 2021), https://www.nordiccapital.com/news/nordic-capital-partners-with-united-veterinary-care/.

15 FTC, *supra* note 13.

16 Sarah Pringle, *JAB Investors' NVA Buys Ethos Veterinary Health in $1.65bn Deal*, PE HUB, Aug. 16, 2021, https://www.pehub.com/jab-investors-nva-buys-ethos-veterinary-health-in-1-65bn-deal/.

17 Press Release, FTC, 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), 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.

18 Press Release, Percheron Capital, Veritas Veterinary Partners Launches National Network of Specialty and Emergency Veterinary Hospitals (Mar. 29, 2022), https://percheroncapital.com/news/veritas-veterinary-partners-launches-national-network-of-specialty-and-emergency-veterinary-hospitals/.

19 FTC, *supra* note 17.

20 DOJ, 2020 Merger Remedies Manual (Sept. 2020), 24, https://www.justice.gov/atr/merger-enforcement.

that "many private equity firms commonly employ "buy-and-build" approaches [and] … [t]hrough these strategies, private equity sponsors can quietly increase market power and reduce competition."[21] Outside of health care, where quality is also a concern, antitrust enforcers have identified three main concerns with private equity acquisitions: (1) stealth private equity roll-ups create market power; (2) private equity firms strip productive capacity making it harder to compete and, consequently, may facilitate unfair methods of competition; and (3) private equity saddles businesses with debt and thereby undermines their competitive viability.[22]

Given the competitive concerns raised about private equity , Chair Khan has said that "[r]egulators should be 'sceptical', when private equity funds seek to absorb businesses divested by companies that are merging" noting that this is "a concession often demanded by government agencies in exchange for consenting to a deal that could otherwise stunt competition."[23] However, the skepticism Chair Khan prescribes appears to be largely absent with respect to the recent consent orders against JAB. Neither the proposed complaint nor the analysis to aid public comment in the JAB matters raise concerns about competitive harm due to JAB's status as a private equity firm.[24] Furthermore, in each of the 2022 orders, Khan's Commission required JAB to divest clinics to *another private equity firm*. The FTC's willingness to require divestitures to private equity buyers suggests that concerns raised by enforcers about private equity are pretextual.

The real objection appears not to be to the private equity business model per se but to any business model that increases firm size through mergers or acquisitions. Antitrust populists, including the current leadership of the U.S. antitrust enforcement agencies, decry the political influence of large firms. But instead of advocating for policies that tackle this political influence directly, they seek reforms to antitrust enforcement that aim to limit the economic advantages of these firms, believing that this will translate into political enfeeblement.[25] The current enforcement focus on private equity is no different. As discussed further below, the private equity "buy and build" or "roll-up" model, which involves achieving scale through acquisition, is anathema to the populist worldview which would have the economy populated largely by small independent firms.[26] And as with other proposed antitrust reforms, the skepticism aimed at private equity risks the real benefits associated with the private equity model.

IV. BENEFITS OF THE PRIVATE EQUITY MODEL

At its heart, private equity model is a business model innovation that can allow firms to achieve productivity improvements that are not attainable through other forms of corporate organization. The private equity model addresses two sources of inefficiencies in business operations: (1) separation of ownership and control; and (2) lack of scale.

Inefficiency arising from the separation of ownership and control typically arises in large, public firms. It has been long understood that "[d]ue to weaknesses in the market for corporate control, difficulties in monitoring by dispersed shareholders, problematic incentives of corporate directors, compensation schemes that reward empire building and myriad other reasons, publicly traded firms can be especially prone to

21 Rohit Chopra, *Statement of Commissioner Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress Commission File No. P110014* (July 8, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf.

22 FTC, *supra* note 13; Lina Khan, *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 Commission 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.

23 Stefania Palma et al., *supra* note 6.

24 Noah Phillips & Christine Wilson, *Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson*, JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, LLC, *File No. 2110140* (June 13, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEPhillipsWilsonConcurringStatement.pdf.

25 Sarah Miller, *End Monopoly Power*, DEMOCRACY J., July 14, 2020, https://democracyjournal.org/magazine/end-monopoly-power/.

26 Sandeep Vaheesan, *Merger Policy for a Fair Economy*, LPE PROJECT, April 5, 2022, *https://lpeproject.org/blog/merger-policy-for-a-fair-economy/*.

value-destroying activities."[27] By taking a public firm private, agency problems associated with the separation of ownership and control may be reduced as the private equity owners take an active role in the management of the firm. To the extent these public-to-private buyouts are focused on long-run profitability and eliminate wasteful spending, they can increase productivity through better management of the firm's assets.

Inefficiency due to lack of scale typically arises in small, private firms. These small firms are less likely to face the agency problems of public firms as the owners are often actively managing the firm, however, their small size may make it more difficult to access capital markets in order to grow the business. An acquisition by a private equity firm, a private-to-private buyout, allows the firm to make investments that increase scale and thereby lower costs and improve productivity. Davis et al. (2021) estimated that productivity at the target firms in private-to-private buyouts increases by nearly 15 percent relative to similar firms that are not backed by private equity.[28]

Private equity firms have continued to innovate and further develop their business model. A recent innovation is the "roll-up" or "buy and build" model. In the roll-up model, the private equity firm makes an initial, typically private-to-private, buyout which serves as a platform to make additional acquisitions in the same or an adjacent industry. The roll-up model has become increasingly popular over the last 20 years. In recent years, about of third of add-on acquisitions (i.e. acquisitions of firms in the same industry as another firm in the private equity firm's portfolio) are part of a roll-up strategy.[29] In addition to the benefits from stand-alone private equity acquisitions, the roll-up model allows for synergies between the acquired firms, additional scale economies, and increased productivity from larger firm size.[30]

The benefits of the private equity roll-up model are readily apparent in the recent roll-ups of veterinary clinics. As noted by the FTC, staffing and obtaining the relevant equipment for veterinary clinics, particularly emergency and specialty clinics, is expensive.[31] Veterinary clinic roll-ups "create efficiencies by offering a standardized package of management, training, and administrative support. Individual clinics … keep their local identities, and resident veterinarians … remain in control of medical decisions."[32] Improved operating efficiency is particularly important at a time "when supply chain bottlenecks are pushing up operating costs" for veterinary clinics. In addition to the supply chain crisis, veterinary clinics are also experiencing a human capital crisis. Acquiring multiple veterinary clinics ensures there are enough veterinarians to cover slack shifts.[33]

V. TARGETED ENFORCEMENT AGAINST PRIVATE EQUITY IS UNWARRANTED

The concerns antitrust enforcers have raised about private equity are largely unfounded. The assertion that private equity firms are engaged in stealth acquisitions that allow them to gain market power neglects that defining a relevant market, a precursor to identifying market power, requires identifying both the relevant product market *and the relevant geographic market*. To the extent that the acquired firms compete in local geographic markets, as do veterinary clinics, as opposed to national geographic markets, the roll-up acquisitions, irrespective of whether they

27 Steven Davis et al., The (Heterogenous) Economic Effects of Private Equity Buyouts (National Bureau of Economic Research, Working Paper No. 26371, Oct. 2019) 4, https://doi.org/10.3386/w26371.productivity, and job reallocation vary tremendously with macroeconomic and credit conditions, across private equity groups, and by type of buyout. We reach this conclusion by examining the most extensive database of U.S. buyouts ever compiled, encompassing thousands of buyout targets from 1980 to 2013 and millions of control firms. Employment shrinks 13% over two years after buyouts of publicly listed firms – on average, and relative to control firms – but expands 13% after buyouts of privately held firms. Post-buyout productivity gains at target firms are large on average and much larger yet for deals executed amidst tight credit conditions. A post-buyout tightening of credit conditions or slowing of GDP growth curtails employment growth and intra-firm job reallocation at target firms. We also show that buyout effects differ across the private equity groups that sponsor buyouts, and these differences persist over time at the group level. Rapid upscaling in deal flow at the group level brings lower employment growth at target firms.","event-place":"Cambridge, MA","language":"en","note":"DOI: 10.3386/w26371","number":"w26371","page":"w26371","publisher":"National Bureau of Economic Research","publisher-place":"Cambridge, MA","source":"DOI.org (Crossref

28 *Id.* at 20.productivity, and job reallocation vary tremendously with macroeconomic and credit conditions, across private equity groups, and by type of buyout. We reach this conclusion by examining the most extensive database of U.S. buyouts ever compiled, encompassing thousands of buyout targets from 1980 to 2013 and millions of control firms. Employment shrinks 13% over two years after buyouts of publicly listed firms – on average, and relative to control firms – but expands 13% after buyouts of privately held firms. Post-buyout productivity gains at target firms are large on average and much larger yet for deals executed amidst tight credit conditions. A post-buyout tightening of credit conditions or slowing of GDP growth curtails employment growth and intra-firm job reallocation at target firms. We also show that buyout effects differ across the private equity groups that sponsor buyouts, and these differences persist over time at the group level. Rapid upscaling in deal flow at the group level brings lower employment growth at target firms.","event-place":"Cambridge, MA","language":"en","note":"DOI: 10.3386/w26371","number":"w26371","page":"w26371","publisher":"National Bureau of Economic Research","publisher-place":"Cambridge, MA","source":"DOI.org (Crossref

29 Bain & Company, Global Private Equity Report 2019 (Feb. 25, 2019) 37, https://www.bain.com/insights/buy-and-build-global-private-equity-report-2019/.

30 Danny Leung et al., *Firm Size and Productivity* (Bank of Canada, Working Paper No. 2008-45, Nov. 2008), https://www.bankofcanada.ca/wp-content/uploads/2010/02/wp08-45.pdf.

31 FTC, *supra* note 9.

32 Bain & Company, *supra* note 29, at 41.

33 Ross Kelly, *Pandemic Hastens Ongoing Trend in Veterinary Consolidation*, VIN NEWS SERVICE, Dec. 30, 2021, https://news.vin.com/default.aspx?pid=210&Id=10652228.

are financed by private equity, are unlikely to create market power except in very limited cases. The JAB matters demonstrate that these roll-ups create few overlaps.

The FTC's consent orders in the JAB matters required the divestiture of less than 10 percent of the total number of post-merger clinics. Furthermore, even if veterinary clinics compete in a national geographic market, which they clearly do not, that market is unconcentrated. In 2017, the market share of the four largest firms providing veterinary services was 13 percent while the market share of the 50 largest firms was only 22 percent.[34] Consequently, there is no basis for the assertion that "[p]rivate equity firms increasingly engage in roll up strategies that allow them to accrue market power off the Commission's radar" — particularly in the context of veterinary clinic acquisitions.[35]

The assertion that private strips productive capacity and saddles a firm with debt making it harder for the firm to compete and threatening the firm's viability is also unfounded and irrelevant to the antitrust analysis. First, this contradicts the goals of the private equity model. Private equity only earns a return when it sells a firm that is more valuable than when it was acquired. A firm that is not competitively viable is not more valuable. Second, this contradicts the evidence on the viability of firms backed by private equity. Bernstein et al. (2020) studied the performance of private equity-backed firms during the 2008-2009 financial crisis and found that, during the crisis, private equity-back firms invested five to six percent more than similar firms that were not backed by private equity. Private equity-backed firms also experienced a greater increase in their stock of assets in the years following the financial crisis and "were not more likely to go out of business or enter into distress in the post-crisis period."[36]

That these assertions are unfounded further demonstrates that the targeted enforcement to which private equity is now subject is pretextual and is only intended to achieve the political ends of antitrust populists. Unfortunately, slowing the growth of the private equity roll-up model also means slowing the growth of small businesses — many of which benefit from the improved access to credit markets and the professionalization of management practices provided by private equity. When these small businesses are more productive, consumers face lower prices. This is something we should cheer, not discourage, in the current high inflation environment.

VI. PRIVATE EQUITY AND PRIOR APPROVAL

Since rescinding the 1995 Policy Statement on Prior Approval and Prior Notice Provisions in July 2021, the FTC now routinely includes prior notice and prior approval requirements in its consent orders — the 2022 JAB orders are no exception.[37] Holly Vedova, Director of the FTC's Bureau of Competition, stated that "[t]he prior notice and approval provisions [in the JAB/SAGE order] will ensure the Commission has full visibility into future consolidation and the ability to address it."[38] The prior notice requirements, while extensive, may be reasonable in an industry where, due the local nature of markets, small transactions that escape Hart-Scott-Rodino notification thresholds can produce large increases in market concentration. The 2020 JAB order reasonably included such a provision. The prior approval requirements, however, evade the statutory limitations placed on the FTC by Congress and unnecessarily burden both merging parties and divestiture buyers.

Given the extensive prior approval requirements in the JAB orders, future acquisitions in relevant geographic markets completely unrelated to the markets in which the FTC alleged harm are now subject to review by the FTC even if they are not competitively problematic. Furthermore, the burden falls on the parties to demonstrate that their deal is not anticompetitive. This is especially burdensome for small firms as they are least likely to be able to bear the costs associated with heightened review. This has the perhaps not unintended consequence of not just deterring anticompetitive acquisitions but deterring procompetitive acquisitions as well. And as the prior approval provisions also apply to divestiture buyers, it will be harder to find qualified buyers to remedy limited overlaps in otherwise competitively unproblematic transactions.

While the unwarranted attack on private equity and the reinstitution of prior approval each on their own are harmful, the combination of the two is particularly pernicious. The private equity roll-up business model brings scale to inefficient, small firms while prior approval require-

34 U.S. Census Bureau, Economic Census (2017), https://data.census.gov/cedsci/table?q=concentration&n=N0600.00&tid=ECNSIZE2017.EC1700SIZECONCEN. This is the most recent year for which data on concentration are available.

35 FTC, *supra* note 13.

36 Shai Bernstein et al., *Private Equity and Portfolio Companies: Lessons from the Global Financial Crisis*, 32, no. 3 J. APPLIED CORPORATE FIN 21-42 (September 2020), https://doi.org/10.1111/jacf.12416.

37 FTC, *Statement of the Commission on Use of Prior Approval Provisions in Merger Orders* (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

38 FTC, *supra* note 13.

ments are most onerous for the small firms that would benefit most from private equity investment. The combination of these two policies puts the largest productivity gains from the private equity roll-up model at risk and thereby limits business model innovation and economic growth.

VII. CONCLUSION

Two wrongs don't make a right. Heightened antitrust scrutiny of private acquisitions combined with the reinstitution of prior approval requirements risks the productivity gains private equity can bring to small firms in highly fragmented industries. We have seen these productivity benefits over the last century, in industry after industry. This includes hotels, restaurants, hair salons, hardware stores, and others. In short, this happens when firms with a national presence bring scale to previously highly fragmented industries. The potential for productivity gains is readily apparent in the veterinary services industry where most veterinary clinics are still independently operated. Bringing cost-reducing innovation to veterinary clinics is particularly important in the current environment where inflation is high and demand for veterinary services is surging. Antitrust enforcers should throw pandemic pet owners a bone and end this unwarranted attack on private equity.

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