



Office of Commissioner
Rohit Chopra

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

**STATEMENT OF
COMMISSIONER ROHIT CHOPRA
JOINED BY COMMISSIONER REBECCA KELLY SLAUGHTER**

*In the Matter of Altria Group, Inc. and JUUL Labs, Inc.
Commission File No. 1910075
April 2, 2020*

Summary

- When it comes to products that affect our health, anticompetitive transactions and practices that entrench dominance pose harms beyond our pocketbooks. Unlawful activity can also undermine government efforts to tame epidemics and protect the public.
- I support the Commission’s complaint against JUUL and Altria to challenge their \$12.8 billion equity investment deal and non-compete agreement. The evidence suggests that JUUL used the transaction to keep Altria out of the e-cigarette market, drive up its valuation, and pay out billions in special dividends.
- However, our complaint leaves out key allegations that JUUL and Altria should answer for. The Commission should have also challenged this conduct as an illegal premeditated conspiracy to monopolize and challenged Altria’s “observer” on JUUL’s board as an unfair method of competition.

Background

JUUL Labs was birthed from a Silicon Valley startup whose founders sought to eliminate smoking. The company developed an e-cigarette product used for “vaping.” Rather than heat-drying tobacco leaves for use in a traditional cigarette, JUUL creates a liquid using nicotine salts that works with its e-cigarette device. JUUL aspired to be an innovator in the tobacco industry that could provide consumers with a less risky way to enjoy tobacco products. Rather than promote public health, I have reason to believe that JUUL’s actions undermined it.

Backed by venture capital investors, JUUL grew rapidly into a leading seller of e-cigarettes. Over time, the value of JUUL’s shares grew, as investors were willing to put in more money to bet on JUUL’s prospects. Like other venture-backed firms with rapidly rising valuations, JUUL likely received intense pressure to justify its valuation by proving that it could continue its massive growth trajectory and beat out any competitive threats. If JUUL failed to do so, its investors would experience a massive decline in the value of their investment.

JUUL certainly grew quickly. The explosive growth of vaping using JUUL’s products has raised many questions about JUUL’s aggressive marketing practices to grow its businesses, particularly in

its targeting of young people. The former Commissioner of the Food & Drug Administration, Dr. Scott Gottlieb, has highlighted JUUL's role in promoting a youth vaping epidemic.¹

State attorneys general in Arizona, California, the District of Columbia, Illinois, Massachusetts, Minnesota, Mississippi, New York, and North Carolina have all filed lawsuits against JUUL for its marketing practices. JUUL positioned itself as a safe alternative to smoking. But, the state lawsuits include allegations that JUUL deceived customers about the nicotine potency of its e-cigarette products, and misrepresented the safety of its products, including the risks of addiction. Other law enforcement agencies across the country have also disclosed that they are investigating JUUL.²

The JUUL-Altria Deal

JUUL's alleged aggressive youth targeting and deceptive marketing were just one part of the company's moves to boost sales and meet investor expectations. The FTC's investigation suggests that this was dual-tracked alongside a move to eliminate competition with Altria (NYSE: MO), formerly known as Phillip Morris Companies, Inc. Altria is the leading seller of traditional cigarettes, like Marlboro, but it also deployed its own competing e-cigarette, the MarkTen, and invested substantial resources to market it. The Commission's complaint details how JUUL and Altria allegedly took steps to eliminate competitive threats, entrench JUUL's dominant position in e-cigarettes, and share JUUL's profits.

In July 2018, JUUL was reportedly valued at \$15 billion.³ But by December 2018, Altria and JUUL struck a deal where Altria paid JUUL \$12.8 billion in cash for a 35% stake in the company, giving it a new valuation of \$38 billion, a phenomenal increase from just a few months before.

I believe a key reason for this rich valuation was a key provision in the agreement where Altria would be able to share in monopoly profits through a non-compete agreement. As part of the deal, JUUL sought and secured a provision that Altria would no longer compete with JUUL in the e-cigarette market. Curiously, in October 2018, Altria publicly claimed that it was discontinuing its e-cigarette product due to concerns about youth vaping. This appears to be a pretext, as it was simultaneously looking to strike a massive deal with JUUL. With Altria's MarkTen out of the market, basic economic logic suggests that JUUL could capture those sales and further dominate the market.

Company insiders hauled in big benefits from this deal. [REDACTED] and [REDACTED], who were investors in JUUL with significant stakes in the company and were directly involved in negotiations, saw the value of their investments skyrocket by billions of dollars. The

¹ Press Release, Statement from FDA Commissioner Scott Gottlieb, M.D., on new steps to address epidemic of youth e-cigarette use (Sept. 11, 2018), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-steps-address-epidemic-youth-e-cigarette-use>; see also, A Conversation with FDA Commissioner Scott Gottlieb on His Tenure and Policy Reforms at The Brookings Institute (Mar. 19, 2019), https://www.brookings.edu/wp-content/uploads/2019/03/es_20190319_gottlieb_fda_transcript.pdf.

² Press Release, Off. of the Conn. Att'y Gen., Connecticut, Florida, Nevada, Oregon, Texas Announce Bipartisan Multistate Investigation Into JUUL (Feb. 24, 2020), <https://portal.ct.gov/AG/Press-Releases/2020-Press-Releases/Connecticut-Announces-Bipartisan-Multistate-Investigation-Into-JUUL>.

³ JUUL Labs, Inc., Notice of Exempt Offering of Securities (Form D) (July 9, 2018); see also Jennifer Maloney, *Juul Raises \$650 Million in Funding That Values E-Cig Startup at \$15 Billion*, WALL STREET JOURNAL (July 10, 2018, 6:48 PM), <https://www.wsj.com/articles/juul-raises-650-million-in-funding-that-values-e-cig-startup-at-15-billion-1531260832>.

deal also reportedly led to a \$2 billion special dividend that created an immediate payout for other company insiders.⁴

The Commission's Complaint Against JUUL and Altria

I agree that the Commission has reason to believe that the terms of this deal violated Section 7 of the Clayton Act and Section 1 of the Sherman Act. However, the complaint the FTC has issued is too narrow and excludes several counts of potential wrongdoing. I also have reason to believe that JUUL engaged in a conspiracy to monopolize in violation of Section 2 of the Sherman Act and included an illegal board observer from Altria in violation of Section 5 of the FTC Act.

Illegal Conspiracy to Monopolize. While the Commission's complaint challenges the suspicious agreement as unlawful under Section 1 of the Sherman Act, the companies' alleged conduct also appears to be a premeditated conspiracy in violation of Section 2 of the Sherman Act.

Section 2 is primarily aimed at preventing injury to competition through exclusion of rivals. Monopolization and attempted monopolization undertaken by a single firm are Section 2's core offenses. But Section 2 also prohibits exclusionary conduct when undertaken in concert between two firms. This is an especially pernicious form of anticompetitive conduct. Conspiracies to monopolize require: (1) a conspiracy, such as a plot by a group to engage in something harmful or unlawful, (2) one or more overt acts in furtherance of the conspiracy, and (3) a specific intent to monopolize.⁵ I have reason to believe that JUUL and Altria's conduct meets these requirements under the law.

A number of facts alleged in the Commission's complaint give reason to believe a conspiracy to monopolize existed. For example, the complaint alleges:

- That JUUL insisted, and Altria understood, that Altria's exit from the e-cigarette market was a non-negotiable condition for any deal;
- That the written agreements between JUUL and Altria required Altria to not only halt competitive activities in the e-cigarette market, but also to commit Altria's considerable resources to entrenching JUUL's dominant position;
- That Altria took affirmative steps to provide JUUL with significant competitive advantages over its rivals. In particular, Altria temporarily leased valuable shelf space to JUUL.

The evidence suggests that [REDACTED] and [REDACTED] were personally involved in negotiating the terms of the multi-billion dollar agreement struck in December 2018. [REDACTED] and [REDACTED]'s involvement is not surprising, given how much was at stake for them.

Conspiracy to monopolize claims are uncommon, but the Commission should not hesitate to include the charge when the facts warrant given the extreme perniciousness of this type of conduct. Here, in my view, the evidence strongly suggests a specific intent to exclude and monopolize with the necessary overt acts. This is a missed opportunity for the Commission.

⁴ Angelica LaVito & David Faber, *Juul employees get a special \$2 billion bonus from tobacco giant Altria – to be split among its 1,500 employees*, CNBC (Dec. 20, 2018), <https://www.cnbc.com/2018/12/20/juul-to-pay-2-billion-dividend-to-its-employees-after-altria-deal.html>.

⁵ *Full Draw Prods. v. Easton Sports*, 182 F.3d 745, 756 (10th Cir. 1999).

Illegal Board Observer. A core objective of our antitrust laws is to prevent competing firms from colluding. United States law prevents this through restrictions on a competitor sitting on a rival's board.⁶

Typically, a board observer is like a regular member of a board of directors, but without a formal vote. While they don't have a vote, they certainly have a say. Like regular board members, board observers often participate in confidential discussions about strategy. Board observers can advocate for a preferred outcome. Board observers can even get access to key data.

As part of the transaction between Altria and JUUL, Altria was given the right to appoint a board observer to JUUL's board of directors. There is significant risk that Altria's Chief Growth Officer, and later its Chief Financial Officer, may have had access to competitively sensitive information on a wide range of topics related to JUUL's business strategy, just like any other board member. I have reason to believe this arrangement undermines a key purpose of Section 8 of the Clayton Act's prohibition on interlocking directorates and was therefore unlawful under Section 5 of the FTC Act, pursuant to the Commission's 2015 Policy Statement.⁷

Altria and JUUL's alleged monopolization scheme might have eliminated their e-cigarette rivalry, but there is reason to believe that they compete on a number of other dimensions. This raises serious questions about the propriety of this board observer arrangement. For example, due to various regulations and to guard against theft, tobacco products are often sold behind cashier counters in places like convenience stores. Convenience store purchasers must maximize returns for a limited amount of shelf space, so sellers of traditional cigarettes and sellers of e-cigarettes often offer promotional allowances, rebates, and other marketing incentives in competition with each other for that shelf space. Tobacco companies, of course, must also compete for tobacco-related raw materials to produce their products, and for talent with tobacco-related expertise.

In light of these realities, allowing a situation where Altria has potential access to JUUL's operational and development plans puts too much risk on consumers and flies in the face of one of the underlying premises of the FTC Act: "... [T]o stop in their incipiency acts and practices which, when full blown, would violate [the Sherman Act and the Clayton Act]. . . ."⁸

I am troubled that the Commission has once again taken this issue off the table completely, as the agency did in the recent rent-to-own industry market allocation scheme that also involved a

⁶ See Section 8 of the Clayton Act; 15 U.S.C. § 19.

⁷ The Commission's 2015 Policy statement explains the breadth and purpose of Section 5 in covering not just conduct that violates the Sherman Act and Clayton Act, but also incipient conduct falling outside the bounds of the antitrust laws: "Section 5 of the Federal Trade Commission Act declares "unfair methods of competition in or affecting commerce" to be unlawful. 15 U.S.C. § 45(a)(1). Section 5's ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act. Congress chose not to define the specific acts and practices that constitute unfair methods of competition in violation of Section 5, recognizing that application of the statute would need to evolve with changing markets and business practices. Instead, it left the development of Section 5 to the Federal Trade Commission as an expert administrative body, which would apply the statute on a flexible case-by-case basis, subject to judicial review." FED. TRADE COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

⁸ *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953); see also *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) ("[T]he Commission has power under Section 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation . . . of the Clayton Act or other provisions of the antitrust laws").

potentially illegal board overlap.⁹ Including this count in the Commission’s complaint would have surfaced further information about the nature of this arrangement.¹⁰

I fear the Commission’s inaction here will reinforce a view that corporations can simply appoint their officers to be “observers” on competitors’ boards, undermining one of the key purposes of the Clayton Act in guarding against the sharing of sensitive information between competitors.¹¹

Conclusion

JUUL and Altria are not small businesses. They are influential firms that can avail themselves of extensive due process we afford respondents to our complaints.¹² Since the Commission has excluded the claims highlighted above, JUUL and Altria do not even have to respond to them.¹³

Based on the evidence I have reviewed, I am concerned that JUUL is involved in a pattern of behavior that poses a danger to the public. The impact of reduced competition on products with health and safety risks raises broader concerns. Intense competition between JUUL, Altria, and other players could have set the stage for a less deadly form of tobacco use.

It is difficult to overstate the benefits of competition when it comes to our health and safety. When makers of products and devices face intense competition, the benefits may not just appear in prices paid by consumers, but they can also result in new, potentially life-saving products and promote public goals. Anticompetitive transactions rob us of these benefits. It is important for the FTC to ensure that it does not unnecessarily narrow its approach to identifying and extinguishing unlawful conduct.

⁹ See Dissenting Statement of Commissioner Rohit Chopra, *In the Matter of Rent-to-Own Market Allocation Scheme*, Comm’n File No. 1910074 (Feb. 21, 2020),

https://www.ftc.gov/system/files/documents/public_statements/1567201/dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_rent_own_store_swaps_1910074.pdf.

¹⁰ While I appreciate that the Commission’s proposed relief includes a ban on board interlocks, the Commission should have included this count in the complaint. This is especially the case given the uncertainty in the market about compliance with the ban on overlapping boards. *See, e.g.*, Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Just., Keynote Address at Fordham University School of Law, *Antitrust in the Financial Sector: Hot Issues and Global Perspectives* (May 1, 2019) (noting that “[t]he use of the term “corporation” in the statute has raised many questions about whether Section 8 applies to non-incorporated entities such as [LLCs] or other structures. Section 8 pre-dates the use of LLCs, and certainly predates the widespread acceptance of structures like limited liability corporations as an alternative corporate form to a traditional “corporation.” To date, courts have not directly addressed this question, although we believe the harm can be the same regardless of the forms of the entities.”),

<https://www.justice.gov/opa/speech/file/1159346/download>.

¹¹ If the FTC is unwilling to pursue board overlaps like these through enforcement actions, the agency should consider a Section 5 competition rulemaking.

¹² Under the FTC Act, the law affords JUUL and Altria with the ability to answer for their actions before we make a final determination of liability and order any relief. The FTC’s Rules of Practice offer extensive due process, well beyond what is required under the FTC Act. *See, e.g.*, 16 CFR Parts 3 and 4, 74 Fed. Reg. 1804 (Jan. 13, 2019).

¹³ The Commission’s omission of Section 5 to challenge the board observer raises the question of whether the Commission would have been better off pursuing this matter in federal court, where the Commission would have the option of seeking forfeiture of any ill-gotten gains. Given the extent of potential harms in this matter, the Commission should have more carefully considered this path.