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Antitrust Enforcement Against Roll-ups and Serial Acquisitions

By Karen Hoffman Lent and Kenneth Schwartz

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Antitrust authorities in the United States have been shining the spotlight on private equity (PE) roll-ups and serial acquisitions, which are multi-merger strategies pursuant to which a buyer acquires multiple companies in an industry. PE investments offer many benefits to target firms, including management, industry and operational expertise. PE also injects needed capital into companies to rescue neglected assets. As such, PE investments often translate into lower costs, increased efficiencies, higher productivity, higher-quality output and sales growth.

Notwithstanding these benefits, the Federal Trade Commission (FTC) and Department of Justice (DOJ) are geared up to investigate and challenge serial acquisitions or roll-ups by PE firms. Many of these transactions have flown "under the radar" because they were below the Hart-Scott-Rodino (HSR) Act's reporting threshold. The agencies are particularly concerned that a PE firm or dominant player could use a roll-up strategy to gradually consolidate market power over time, without triggering any enforcement action.

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Serial Acquisitions Have Long Been Within the Purview of US Antitrust Laws

Serial acquisitions are no new phenomenon; they occurred as early as the latter half of the 19th century. *See, e.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1, 31-42 (1911); *United States v. American Tobacco*, 221 U.S. 106, 157-60 (1911).

In 1948, the FTC published a report expressing concern over the serial acquisitions of small businesses by wartime capital. The FTC observed that "where several large enterprises are extending their power by successive small acquisitions, the cumulative

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effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply." FTC, The Merger Movement: A Summary Report, at 7 (1948).

The Supreme Court echoed this message, explaining that the 1950 amendment of the Clayton Act was specifically intended to address market power achieved through a series of acquisitions, and to curb "the rising tide of economic concentration…in its incipiency." *Brown Shoe v. United States*, 370 U.S. 294, 317-18 (1962).

Guideline 11 says that the agencies may investigate an acquisition even if it involves only partial ownership or minority interest.

While enforcement against serial acquisitions has deep historical roots, enforcement activities have mushroomed in recent years, especially in health care and digital markets.

Agencies Are Buckling Down on PE Roll-ups in Health Care Markets

The antitrust enforcement agencies have been especially troubled by PE roll-ups in the health care industry. In July 2020, then-FTC Commissioner Rohit Chopra suggested that the Commission should require information on non-reportable mergers in the health care sector using the FTC's authority under section 6(b) of the FTC Act. *See* FTC, Statement of Commissioner Rohit Chopra (July 8, 2020). He also urged the Commission to closely scrutinize any HSR filings by PE firms to gain insight into their future acquisitions that may be non-reportable.

FTC Chair Lina Khan has made it the Commission's top priority to address consolidation in health care markets. In September 2023, the FTC filed a complaint against U.S. Anesthesia Partners Inc. (USAP) and its PE owner, Welsh Carson, in the U.S. District Court for the Southern District of Texas. The complaint alleges that USAP and Welsh Carson engaged in illegal consolidation of the anesthesia market in Texas via a decade-long roll-up scheme that involved over a dozen anesthesia practices, a thousand doctors and 750 nurses. *See* Complaint, *FTC v. U.S. Anesthesia Partners*, Case No. 4:23-cv-03560, at 3 (S.D. Tex. Sept. 21, 2023).

The FTC alleges that USAP systematically bought up nearly every large Texan anesthesia practice to create a single dominant provider, and as a result, was able to extract monopoly profits. The FTC also accuses the defendants of signing illicit price-setting agreements with remaining independent practices and sidelining a major competitor by signing a market allocation agreement to keep it out of USAP's territory. This case represents the first time that the FTC has challenged a PE roll-up (as opposed to an individual acquisition) as an anticompetitive monopolization scheme.

The USAP complaint was followed by a White House statement in December 2023, which tasked the DOJ, FTC and Department of Health and Human Services (HHS) to issue a joint Request for Information (RFI) to seek input from public stakeholders on how the increasing power and control of the health care sector by PE firms and other corporations is affecting American consumers. *See* The White House, Fact Sheet: Biden-Harris Administration Announces New Actions to Lower Health Care and Prescription

Drug Costs by Promoting Competition (Dec. 7, 2023). As part of this effort, the agencies are expected to work together on case referrals, reciprocal training programs, data-sharing and further development of additional health care competition policy initiatives. The HHS Centers for Medicare & Medicaid Services is releasing, for the first time, ownership data on Federal Qualified Health Centers and Rural Health Clinics, in order to shed light on ownership trends in health care.

Pursuant to the White House order, the agencies issued an RFI on March 5, 2024, seeking public comments on the goals, objectives and effects of transactions conducted by PE funds, health systems and private payers. In particular, the agencies are looking for information that shows how consolidation has affected the costs for patients of obtaining care, the reimbursement rates for public and private payers, and the working conditions and compensation for health care workers. *See* DOJ, HHS, FTC, Docket No. ATR 102, Request for Information on Consolidation in Health Care Markets (Mar. 5, 2024).

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Also on March 5, 2024, the FTC hosted a public workshop on PE in health care. Speaking at the workshop, Khan acknowledged that some PE investments inject much-needed capital into small and medium businesses, with beneficial long-term effects.

But she also highlighted three types of PE investment strategies about which the agencies are concerned: (1) the "flip and strip" approach, pursuant to which PE firms use large amounts of debt to acquire companies, with the goal of increasing profits quickly so that they can resell and reap returns a few years later; (2) the "buy-and-build" model, pursuant to which firms grow their market position while evading antitrust investigation through a series of smaller deals below the reporting threshold; and (3) a partial acquisition approach, pursuant to which PE firms buy up significant stakes in rival firms in the same industry, hampering competition by reducing the incentive of the partially acquired firms to compete. *See* FTC, Remarks by Chair Lina M. Khan As Prepared for Delivery Private Capital, Public Impact Workshop on Private Equity in Healthcare (Mar. 5, 2024).

At the same workshop, Commissioner Rebecca Slaughter said that enforcement will focus on the underlying model that a PE firm embraces by examining the incentives behind each transaction. She also noted that the PE roll-up phenomenon is not unique to the health care market, pointing to retail and veterinary services as two other examples.

Given the pending USAP litigation and the latest RFI, enforcement activities against PE in health care likely will not cease anytime soon. Firms in this space should continue to closely monitor developments and plan business activities accordingly.

Serial Acquisitions by Large Tech Companies Are Also Under Close Scrutiny

Besides PE roll-ups, the agencies are also closely scrutinizing serial acquisitions by large technology firms in digital markets. The

agencies are concerned that large platforms are acquiring start-ups, patent portfolios, and teams of technologists outside of the agencies' purview, thus consolidating their market power over time, raising price for consumers, and stifling innovation.

In February 2020, the FTC issued Special Orders under section 6(b) of the FTC Act, which authorizes the Commission to conduct wide-ranging studies that do not have a specific law enforcement purpose. It asked the five largest technology firms in the United States—Alphabet (Google), Amazon, Apple, Facebook (now Meta), and Microsoft—to provide information and documents on the terms, scope, structure, and purpose of transactions consummated between 2010 and 2019, for which the company did not file an HSR notification form. Through these orders, the FTC sought more insight into the trends of acquisitions and the structure of deals. *See* FTC, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study (Sept. 15, 2021).

Khan said that this study highlighted the "systemic nature of [large technology companies'] acquisition strategies" and underscored the need to examine loopholes in the HSR Act that have permitted deals to unjustifiably "fly under the radar." FTC Press Release, FTC Staff Presents Reports on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021).

Then-Commissioner Chopra highlighted avoidance tactics that firms use to evade agency investigation. For example, a buyer may engage in what is known as an "acqui-hire," by providing a payout to a startup and its employees to acquire the target's assets and to hire the target's key employees. Alternatively, the target firm may pay investors a special dividend, after which the buyer can purchase the target at a price below the HSR reporting thresholds.

In January 2023, the DOJ, along with the attorneys general of California, Colorado, Connecticut, New Jersey, New York, Rhode Island, Tennessee and Virginia, filed a civil suit against Google, alleging that Google has monopolized multiple digital advertising technology (ad tech) products through a series of acquisitions, including its acquisition of DoubleClick in 2008, AdMob in 2009, Invite Media in 2010 and AdMeld in 2011.

According to the plaintiffs, Google's market share for publisher ad servers rose from 60% in 2008 to 90% in 2015. The DOJ and the eight state attorneys general alleged that "Google's acquisitions…helped [it] achieve dominant positions at each level of the open web ad tech stack and set the stage for Google to control and manipulate the process by which publishers sell and advertisers buy open web display inventory." Complaint, *U.S. v. Google*, Case No. 1:23-cv-00108, at 35 (E.D. Va. Jan. 24, 2023).

The plaintiffs challenged the series of acquisitions, as well as other anticompetitive conduct, as "a series of interrelated and interdependent actions, which have had cumulative and synergistic anticompetitive effects."

How the New Merger Guidelines Address Serial Acquisitions

The agencies' focus on the cumulative anticompetitive effects of a series of acquisitions is reflected in their new Merger Guidelines, which were released Dec. 21, 2023. Several guidelines specifically address the

agencies' concerns around serial acquisitions and roll-ups.

In particular, Guideline 7 says that the agencies will examine the "recent history and likely trajectory of an industry" when assessing whether a merger presents a threat to competition, including any "trend toward concentration," "trend toward vertical integration," "arms race for bargaining leverage," and "multiple mergers." FTC, Merger Guidelines (2023), at 22-23 (Dec. 18, 2023).

Guideline 8 enables the agencies to "evaluate the series of acquisitions as part of an industry trend…or evaluate the overall pattern or strategy of serial acquisitions by the acquiring firm collectively." The agencies may look at historical evidence, including the strategic approach taken by the firm, as well as evidence of current incentives, including documents and testimony reflecting its plan and incentives both for the individual transaction and the firm's position in the industry more broadly.

Guideline 11 says that the agencies may investigate an acquisition even if it involves only partial ownership or minority interest. The agencies say that a partial ownership may still lessen competition by giving the partial owner the ability to influence the competitive conduct of the target firm, reduce the incentive of the acquiring firm to compete, and give the acquiring firm access to non-public, competitively sensitive information from the target firm. Under the new Merger Guidelines, firms cannot avoid antitrust scrutiny by taking minority positions.

Conclusion

In sum, while antitrust enforcement against serial acquisitions has a long history in the United States, the FTC and DOJ have been especially active in investigating roll-ups and serial acquisitions in recent years, particularly in health care and digital markets. But agency investigation has not been limited to those sectors, and companies across the board should be vigilant when planning multiple deals in the same industry. Specifically, firms should be prepared to report prior acquisitions when filing premerger notification forms, as well as justify the rationale behind each transaction with supporting evidence.