

CLIENT ALERT

DOJ and FTC Seeking Information on Private Equity Deals and “Serial” Acquirers

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On May 23, 2024, the Federal Trade Commission (“FTC”) and the Justice Department’s (“DOJ”) Antitrust Division launched a public inquiry to identify sectors of the economy that have been impacted by serial acquisitions, including so-called “roll-up” strategies by private equity firms.¹ These strategies refer to when a company purchases multiple, smaller companies operating in the same or related industry sector.² Although such strategies can help companies build scale and generate efficiencies that can benefit consumers, leadership of both antitrust enforcement agencies have expressed concerns that, in some circumstances, roll ups can harm competition. The agencies have vowed to bring additional cases to challenge such harmful serial acquisitions, even if they fall below the Hart-Scott-Rodino Act reporting thresholds.

The agencies’ joint Request for Information (“RFI”) seeks comments from “consumers, workers, businesses, advocacy organizations, professional and trade associations, local, state and federal elected officials, and others.”³ The RFI seeks information on all sectors and industries in the U.S. economy, such as housing, defense, cybersecurity, distribution businesses, agriculture, construction, aftermarket/repair, and professional services markets.⁴ Comments are due no later than July 22, 2024.⁵

¹ FTC, “FTC and DOJ Seek Info on Serial Acquisitions, Roll-Up Strategies Across U.S. Economy,” (May 23, 2024), available at <https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-doj-seek-info-serial-acquisitions-roll-strategies-across-us-economy> [*hereinafter* FTC & DOJ May 2024 RFI Press Release].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

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This new inquiry follows a number of comments from leadership at both agencies promising greater scrutiny of serial acquisitions,⁶ and comments suggesting that there is heightened skepticism about roll ups by private equity companies in particular.⁷ In March 2024, the FTC, DOJ and the U.S. Department of Health and Human Services launched a similar public inquiry that specifically targeted private equity and other corporations’ “increasing control over health care.”⁸ The government’s stated concern is that an increase in the consolidation of healthcare-related companies would threaten the patient welfare, quality of care, and workers’ safety.⁹ The updated merger guidelines issued in December 2023 also emphasized a focus on challenging serial acquisitions.¹⁰

Despite these articulated concerns, to date, the agencies have only brought one case against a private equity firm challenging an alleged roll up. In September 2023, the FTC sued U.S. Anesthesia Partners, Inc. (“USAP”) and private equity firm Welsh, Carson, Anderson & Stowe (“Welsh Carson”) for engaging in these acquisition practices.¹¹ The FTC alleged that USAP and Welsh Carson had carried out a roll-up scheme by buying up every major anesthesia practice in the state, creating a single provider, and driving up prices.¹² Although Welsh, Carson was recently dismissed as a defendant in that case, the FTC continues to challenge the underlying acquisitions.¹³ The FTC has made it clear that it will “continue to scrutinize and challenge serial acquisitions, roll-ups, and other stealth consolidation schemes that unlawfully undermine fair competition.”¹⁴

The new public inquiry is therefore best understood as an effort by the agencies to try to find additional cases like the USAP case. Because many acquisitions executed as part of a roll up strategy are too small to be required to be reported to federal antitrust agencies, the agencies are concerned that companies may be able to expand control over key products, services,

⁶ DOJ, “Deputy Assistant Attorney General Andrew Forman Delivers Keynote at the ABA’s Antitrust in Healthcare Conference,” (Jun. 3, 2022), available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust>.

⁷ *Id.*

⁸ FTC, “Federal Trade Commission, the Department of Justice and the Department of Health and Human Services Launch Cross-Government Inquiry on Impact of Corporate Greed in Health Care,” (Mar. 5, 2024), available at <https://www.ftc.gov/news-events/news/press-releases/2024/03/federal-trade-commission-department-justice-department-health-human-services-launch-cross-government>.

⁹ *Id.*

¹⁰ See DOJ and FTC, “Merger Guidelines,” (Dec. 18, 2023), available at <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf> at 3 (“Guideline 8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series”). We summarized and analyzed the final merger guidelines in a January 3, 2024 memorandum, available [here](#).

¹¹ FTC, “FTC Challenges Private Equity Firm’s Scheme to Suppress Competition in Anesthesiology Practices Across Texas,” (Sept. 21, 2023), available at <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across> [*hereinafter* FTC Sept. 2023 PE Anesthesiology Challenge Press Release].

¹² *Id.*

¹³ *FTC v. U.S. Anesthesia Partners, Inc. et al.*, No. 4:23-cv-03560 (S.D. Tex. 2024), Motion to Dismiss (May 13, 2024).

¹⁴ FTC Sept. 2023 PE Anesthesiology Challenge Press Release.

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or labor markets without government oversight.¹⁵ By soliciting comments directly from customers and other market participants, the agencies are hoping to learn about non-reportable deals that may raise concerns.¹⁶

Clients should be aware of the government’s ongoing efforts to scrutinize non-reportable deals, and should consider seeking antitrust advice before embarking on a strategy to acquire multiple companies in the same industry, even if those acquisitions are not reportable. Willkie attorneys have extensive experience with government antitrust investigations and in serving the needs of private equity clients, and are well-positioned to help clients understand and navigate the government’s current enforcement approach. Willkie’s Antitrust and Competition Practice Group will be closely monitoring this RFI as it unfolds.

¹⁵ FTC & DOJ May 2024 RFI Press Release.

¹⁶ *Id.*

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