PRIVATE EQUITY ROLL-UPS AMIDST HEIGHTENED ANTITRUST ENFORCEMENT

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By William Stallings, Jeremy Silas & Gaby Duenas

In the last few years, the Federal Trade Commission ("FTC") and the Department of Justice Antitrust Division ("DOJ") have increasingly set their sights on serial acquisitions in fragmented markets, colloquially referred to as "roll-ups." The agencies have also identified their main suspect: private equity firms. In this article, we discuss the history of antitrust enforcement on roll-ups and serial acquisitions, the current tools regulators will use to target roll-up strategies, and the current landscape of enforcement as well as what is to come. Despite increased enforcement often using new theories, private equity roll-ups look poised to continue for now, setting the scene for an ultimate clash.

I. INTRODUCTION

Private equity firms and acquisitive companies are under fire from enforcement regulators for engaging in so-called "roll-up" or "serial acquisition" strategies, whereby they acquire interests in multiple firms operating in the same industry. Enforcers allege that these strategies are enabled by the fact that the Hart-Scott Rodino Antitrust Improvements Act ("HSR Act"), enacted in 1976, requires parties to report mergers and acquisitions, but only where they exceed specific size and revenue thresholds.[2] The result is that funds and companies can enter into a series of nonreportable transactions that, ultimately taken together, result in partial or total ownership of a large number of competing firms. These multiple transaction are commonly referred to as roll-ups or serial acquisitions.

Enforcers assert roll-ups can lead to the creation of highly concentrated markets and an increased risk of "coordination" among companies.[3] Several agencies recently turned their attention to roll-ups and their potential anticompetitive effects. For example, on March 5, 2024, the Department of Justice ("DOJ"), Federal Trade Commission ("FTC"), and Department of Health and Human Services ("HHS") combined forces to launch a "cross-government public inquiry into private-equity and other corporations' increasing control over health care."[4] The agencies expressed concern that private equity firms are becoming increasingly involved in transactions involving the health care system.[5] The regulators promptly issued a Request for Information ("RFI") seeking public input on the impact of private equity on the health care system.[6] The FTC and Antitrust Division have since widened their focus beyond the healthcare industry, issuing a second RFI on roll-ups in other markets.[7] FTC Commissioner Slaughter recently addressed these two RFIs, adding that the Commission is paying attention to what it is seeing "when private equity enters markets, because people are telling us that it's a problem."[8]

Notwithstanding the enforcers' comments, roll-ups are not inherently anticompetitive. Far from it. Roll-ups can offer procompetitive benefits such as creating efficiencies, scale economies, and greater offerings to consumers. Furthermore, the agencies have not issued clear guidance on the circumstances that would suggest any particular roll-up strategy lessens competition, particularly when the roll-up involves acquisitions of companies operating in separate geographic markets.

II. THE PRIVATE EQUITY MODEL

Private equity deals differ from traditional corporate deals. Corporations typically enter into merger and acquisition agreements with the long-term objective of becoming more competitive, such as through growth, cost savings, or other synergies. On the other hand, private equity firms typically acquire a company with the goal of reselling it after enhancing its performance, usually within 5-8 years.[9] The financial structure of private equity transactions also differs from typical mergers. Private equity firms primarily use debt to finance acquisitions and then place that debt on the balance sheet of the acquired company. As mentioned, acquisitions over the HSR threshold must be reported, so private equity acquisitions that do not exceed the HSR threshold go unreported.[10]

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2 Fed. Trade Comm'n, FTC Announces 2024 Update of Size of Transaction Thresholds for Premerger Notification Filings (Jan. 22, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-announces-2024-update-size-transaction-thresholds-premerger-notification-filings; *What is the Hart-Scott-Rodino Act?*, Thomas Reuters, https://legal.thomsonreuters.com/en/insights/articles/navigating-the-hart-scott-rodino-act-/.

3 Antonio Capobianco, *Directorate For Financial and Enterprise Affairs Competition Committee*, Organization for Economic Co-operation and Development (Dec. 6, 2023), https://one.oecd.org/document/DAF/COMP/WD(2023)99/en/pdf.

4 Fed. Trade Comm'n, 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), https://www.ftc.gov/news-events/news/press-releases/2024/03/federal-trade-commission-department-justice-department-health-human-services-launch-cross-government.

5 See *id.*

6 See *id.*

7 FTC and DOJ Seek Info on Serial Acquisitions, Roll-Up Strategies Across U.S. Economy (May 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-doj-seek-info-serial-acquisitions-roll-strategies-across-us-economy?utm_source=govdelivery.

8 Khushita Vasant, *US FTC's Slaughter Encourages Americans to Flag 'Problematic' Anticompetitive Behavior by Private Equity Players*, MLex (Jun. 25, 2024), https://content.mlex.com/#/content/1572472/us-ftc-s-slaughter-encourages-americans-to-flag-problematic-anticompetitive-behavior-by-private-equity-players?referrer=email_instantcontentset&paddleid=202&paddleaois=2000.

9 Judith Garber, *The Rising Danger of Private Equity in Healthcare*, Lown Institute (Jan. 23, 2024) https://lowninstitute.org/the-rising-danger-of-private-equity-in-healthcare/#:~:text=Private%20equity%20acquisitions%20often%20go,not%20be%20reported%20to%20authorities.

10 Judith Garber, *The Rising Danger of Private Equity in Healthcare*, Lown Institute (Jan. 23, 2024) https://lowninstitute.org/the-rising-danger-of-private-equity-in-healthcare/#:~:text=Private%20equity%20acquisitions%20often%20go,not%20be%20reported%20to%20authorities.

III. HISTORY OF ANTITRUST ENFORCEMENT

While antitrust enforcement in the private equity sector has picked up recently, government agencies have a long history of enforcement against serial acquisition strategies in corporate deals. This brief walk through the history of enforcement against serial acquisitions demonstrates that the agencies' interest in roll-up strategies isn't new; it just has new terminology, theories, and different players. Dating back to 1911, in *Standard Oil Co. v. U.S.*, the Supreme Court found that Standard Oil's serial acquisitions led to a monopolization of the oil market.[11] The Court ultimately ordered Standard Oil to break up into smaller companies, cementing the theory that a series of "small" acquisitions can ultimately harm competition.[12]

Enforcement against serial acquisitions continued into the twentieth and twenty-first centuries. In 1956, the FTC filed a complaint against Beatrice Foods Co. for violations of Section 7 of the Clayton Act and Section 5 of the FTC Act after Beatrice Foods acquired over 131 companies that distributed, manufactured, processed, and distributed dairy products. 67 F.T.C. 473 (1965). In 1965, the FTC adopted in part the hearing examiner's findings that Beatrice Foods violated Section 7 of the Clayton Act because some of its acquisitions decreased competition. Id.

On January 22, 2010, the DOJ sued Dean Foods Company after learning that Dean Foods acquired Foremost Farms USA Cooperative's Consumer Products Division, including two dairy processing plants in Waukesha and De Pere, Wisconsin.[13] Dean Foods was not required under law to report the merger pursuant to HSR guidelines in place at the time. On March 29, 2011, the DOJ announced that it reached a settlement with Dean Foods requiring Dean Foods to divest the processing plant located in Waukesha, Wisconsin. In addition, Dean Foods was required to prospectively notify the Department of Justice before it acquired any processing plants if the purchase price exceeded $3 million. Even though the acquisitions were "small" enough to avoid HSR requirements, the DOJ once again demonstrated enforcers' willingness to scrutinize the aggregate effect of multiple acquisitions.

And just last year, on January 24, 2023, the DOJ along with several states alleged that Google monopolized numerous digital advertising technology products through serial acquisitions, allegedly forcing publishers and advertisers to use Google's products.[14] Once again, although these deals individually did not result in antitrust enforcement, the agencies were willing to act looking at their alleged cumulative effect.

IV. REGULATORS' BROADENING ENFORCEMENT TOOLBOX

Under the Biden administration, the enforcement agencies have been keen to utilize every tool arguably available to them under the antitrust laws. The same is true for actions against private equity firms. In their recent joint workshop, the enforcement agencies mentioned several areas of use against private equity, including: the "incipient monopolization doctrine," expansion of Section 5 of the FTC Act, Section 8 of the Clayton Act, prior approval provisions, and the 2023 Merger Guidelines.

A. "Incipient monopolization" Doctrine Under Section 7 of the Clayton Act

Section 7 of the Clayton Act ("Section 7") prohibits mergers and acquisitions where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[15] The "incipiency" doctrine refers to the Supreme Court's holding in *Brown Shoe Co. v. United States* which applies Section 7 "to situations wherein the merger itself may not constitute a violation, but may indicate a trend toward eventual monopolistic concentration."[16] Despite heavy criticism of *Brown Shoe* and its progeny, the FTC will likely use the doctrine to challenge private equity roll-ups that could lessen competition.

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11 *Stand. Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 32 (1911).

12 See *id.* at 78; see also *Historical M&A deal: Chevron and Exxon Mobil*, ASL Law, https://aslgate.com/historical-ma-deal-chevron-and-exxon-mobil/. See also *U.S. v. American Tobacco Co.* 221 U.S. 106, 187 (1911) (finding that serial acquisitions by the American Tobacco Company violated the antitrust laws).

13 Dep't of Just., Justice Department Reaches Settlement with Dean Foods Company, https://www.justice.gov/opa/pr/justice-department-reaches-settlement-dean-foods-company.

14 Dep't of Just., Justice Department Sues Google for Monopolizing Digital Advertising Technologies, (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies.

15 15 U.S.C. § 18.

16 *Antitrust Law--Mergers--Section 7 of the Clayton Act Violated by Potential The Potential Threat to Competition (United States to Competition (United States v. Von's Grocery Co., 384 U.S. 270 (1966))*, Vol. 41, St. John's L. Rev., 263 (1966).

B. Expansion of Claims Under Section 5 of the FTC Act

Section 5 of the FTC prohibits ''unfair or deceptive acts or practices in or affecting commerce."[17] On November 10, 2022, the FTC issued a new policy statement which broadened Section 5 and rescinded a 2015 policy which applied a rule of reason framework to potential claims.[18] Under the new policy statement, the FTC can act "against [any] conduct that is unfair."[19] Thus, the FTC contends that "Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions."[20] This reading of Section 5 would give the FTC the opportunity to find that private equity roll-ups are "unfair," even if they do not violate the Sherman or Clayton Acts.

C. Section 8 of the Clayton Act (Interlocking Directorates)

Private equity deals almost always result in the private equity firm obtaining board of director seats. Section 8 of the Clayton Act "prohibits a board-appointed officer or director from serving on the board or on the management of a competing corporation."[21] Interlocking directorates have been a concern for antitrust enforcers since the early 20th century.[22] However, despite its prohibition remaining in effect, Section 8 enforcement actions were infrequent in the last thirty years, primarily because directors would abandon the interlock if a Section 8 question was raised. The FTC and DOJ have recently renewed interest in utilizing Section 8. Within the last two years, both enforcers have taken several actions using Section 8 to unwind "interlocked" directorates, with an apparent spotlight on private equity.[23] Most recently, on May 2, 2024, the FTC prohibited an executive from serving on Exxon's board following their merger with Pioneer Natural Resources Company.[24] The FTC has noted its concern that "private equity firms and other alternative asset investors buying up significant stakes in rival firms that compete within the same industry."[25] Utilizing Section 8, the FTC feels "well positioned to challenge these types of ownership structures," and increased enforcement should be expected.[26]

D. Prior Approval Provisions

On July 21, 2021, the FTC voted to rescind a 1995 policy statement which ended the Commission's use of prior approval provisions in consent orders resolving merger investigations.[27] The Commission noted that prior approval provisions are a "critical tool" that will help reduce "the risk that the Commission will not learn of harmful mergers that do not trigger federal antitrust reporting requirements."[28] As previously mentioned, roll-ups typically do not trigger HSR reporting requirements. Reinvigorating prior approval provisions gives the FTC another enforcement option to use against private equity groups that enter into consent agreements. With prior approval provisions, the FTC can monitor roll-up strategies in their incipiency.

E. Guideline 8

Guideline 8 from the 2023 Merger Guidelines states that "[i]f an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy" when applying the Guidelines framework.[29] Chair Khan has since

17 15 U.S.C § 45.

18 Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

19 *Id.*

20 See *id.*

21 15 U.S.C. § 19(a).

22 Louis D. Brandeis, Chapter III, Other People's Money, 1914, https://louisville.edu/law/library/specialcollections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-iii.

23 See DOJ Press Release, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates, March 9, 2023, https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal; Analysis to Aid Public Comment, *In the Matter of EQT Corporation*, File No. 221-0212 (Aug. 16, 2023).

24 See FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal, *supra* note 26.

25 Remarks by Chair Lina Khan, Private Capital, Public Impact Workshop on Private Equity in Healthcare (Mar. 5, 2024), at 4, https://bit.ly/3Unh5VV.

26 *Id.* at 2.

27 FTC Policy Statement, Statement Of The Commission On Use Of Prior Approval Provisions In Merger Orders, July 21, 2021, https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

28 *Id.*

29 U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines (2023), Guideline 8, https://www.justice.gov/atr/2023-merger-guidelines.

pointed out that to stop unlawful roll-ups and serial acquisitions, the agencies will use Guideline 8 and "consider individual acquisitions in light of the cumulative effect of related patterns or business strategies."[30] The potential application of Guideline 8 could be a blocked merger not based on any anticompetitive effects of the present acquisition, but a broader look at effects from previous and future acquisitions. Such a theory has not been tested in court.

V. RECENT AGENCY ENFORCEMENT

The agencies have already acted against private equity's roll-ups and serial acquisitions and used many of the tools mentioned above. In the last two years, the FTC has taken particular aim at private equity acquisitions in the veterinary and healthcare markets.

A. Veterinary Services

In mid-2022, the FTC took two actions against the private equity group JAB Consumer Partners in their pursuit of veterinary clinics.[31] As part of a consent agreement, the FTC required JAB to divest veterinary clinics in California and Texas as a condition of clearance for its $1.1 billion acquisition of a competing veterinary clinic operator.[32] The consent agreement also required JAB to 1) seek prior approval for an acquisition of any specialty or emergency veterinary clinic within 25 miles of a JAB-owned clinic in California and Texas, 2) provide the FTC with prior notice for an acquisition of any specialty or emergency veterinary clinic within 25 miles of a JAB-owned clinic in the entire U.S., and 3) comply with both requirements for the next 10 years.[33] Holly Vedova, the previous Director of the Bureau of Competition, noted the Commission's concern on private equity roll-ups and that the "prior notice and approval provisions will ensure the Commission has full visibility into future consolidation and the ability to address it."[34]

Just a few weeks later, the FTC took action again against JAB for another proposed purchase of a veterinary clinic operator.[35] In this consent agreement, JAB was required to 1) divest five clinics, 2) obtain prior approval before acquiring a specialty or emergency veterinary clinic within 25 miles of any JAB clinic in California, Colorado, DC, Maryland, or Virginia for 10 years, and 3) notify the FTC prior to acquiring any specialty or emergency veterinary clinic within 25 miles of a JAB clinic even if it need not be reported under the HSR for 10 years.[36] Vedova noted that this was the second time in a month "the FTC is taking action to prevent private equity firm JAB from gobbling up competitors in regional markets that are already concentrated."

The remedies imposed against JAB reveal a key open question about roll-up enforcement. The FTC obtained stricter prior approval provisions for future JAB acquisitions in those geographic areas where the FTC had investigated past acquisitions and determined that the roll-ups arguably had lessened competition. But, the Commission obtained only prior notice provisions for acquisitions covering overlap markets. The FTC remedy thus focused on overlap markets, not roll-ups in multiple geographic areas where the parties did not overlap. It is, e.g. hard to see antitrust implications of a company operating in New York geographic markets buying an entity focusing on California locations. It remains to be seen whether enforcers will espouse theories of harm under such circumstances.

B. Healthcare

In late 2023, the FTC sued U.S. Anesthesia Partners, Inc. ("USAP") and private equity firm Welsh Carson for their roll-up strategy of anesthesia services in Texas. Specifically, Chair Khan stated that "[p]rivate equity firm Welsh Carson spearheaded a roll-up strategy and created USAP to buy

30 See Remarks by Chair Lina Khan, Private Capital, Public Impact Workshop on Private Equity in Healthcare (Mar. 5, 2024), at 3, https://bit.ly/3Unh5VV.

31 FTC Press Release, 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; FTC Press Release, 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.

32 FTC Press Release, 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.

33 *Id.*

34 *Id.*

35 FTC Press Release, 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.

36 *Id.*

out nearly every large anesthesiology practice in Texas. Along with a set of unlawful agreements to set prices and allocate markets, these tactics enabled USAP and Welsh Carson to raise prices for anesthesia services…"[37] Although these acquisitions were made by USAP, the FTC alleged Welsh Carson played a significant role in acquiring the group's first practice, targeting and acquiring other practices, and managing price-setting agreements with competitors.[38]

However, the FTC's allegations did not keep Welsh Carson in the case. On May 14th, 2024, Judge Hoyt of the Southern District of Texas dismissed Welsh Carson from the action while denying the motion to dismiss filed by USAP.[39] Specifically, Judge Hoyt found that Welsh Carson's mere 23 percent ownership stake was not enough of a hook to qualify as an "ongoing violation" under Section 13(b). The court held that any ongoing scheme would be the actions of USAP, and that even if Welsh Carson had the "blueprints, finances, and personnel to continue this scheme," "the mere capacity to do something does not meet the requirement that the thing is likely to recur."

Despite the dismissal, Chair Khan noted in the FTC Open Meeting that the ruling was "an important win in our first roll up case," and that it was important the district court "upheld the Commission's serial acquisitions claim in full as it concerned USAP."[40]

VI. CONCLUSION

Private equity roll-ups and serial acquisitions have accelerated in recent years. Given their prevalence, it is no surprise roll-ups have garnered the attention of the antitrust enforcement agencies. Using the options in their regulatory toolbox, the antitrust agencies clearly are committed to aggressive antitrust enforcement in this area. While courts stand as the final arbiter of whether any particular roll-up is found to be anticompetitive, agency action is unlikely to soften. Accordingly assessment of antitrust risk for prospective deals and the management of portfolio companies, including the appointment of directors across a portfolio, must now be looked at through the lens of heightened and novel enforcement attempts.

37 FTC Press Release, FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas, Sep. 21, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

38 Sheela Ranganathan, *Split Decision: PE Firm Dismissed From FTC Challenge, But Litigation Continues*, HEALTH AFFAIRS, JUN. 4, 2024, HTTPS://WWW.HEALTHAFFAIRS.ORG/CONTENT/FOREFRONT/SPLIT-DECISION-PE-FIRM-DISMISSED-FTC-CHALLENGE-BUT-LITIGATION-CONTINUES.

39 Scott Perlman, Oral Pottinger, Jeremy Silas, Ora Nwabueze, *Private Equity Roll-Ups: Court Dismisses Welsh Carson From Roll-Up Litigation*, MAYER BROWN, MAY 29, 2024, HTTPS://WWW.MAYERBROWN.COM/JA/INSIGHTS/PUBLICATIONS/2024/05/PRIVATE-EQUITY-ROLL-UPS-COURT-DISMISSES-WELSH-CARSON-FROM-ROLL-UP-LITIGATION.

40 Remarks by Chair Lina Khan, Open Commission Meeting (May 23, 2024), at 12, https://www.ftc.gov/system/files/ftc_gov/pdf/transcript-ftc-open-commission-meeting-5.23.24.pdf.

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