



FTC and DOJ Request Information on Serial Acquisitions and Roll-Up M&A Activity

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In a rare move, the federal antitrust enforcement agencies, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ), have issued a joint request for information seeking details from the public on serial acquisitions and roll-up strategies. These are consolidation strategies whereby a company seeks to increase its market power and possibly obtain a monopoly by acquiring multiple companies in the same or related industry through a series of acquisitions that fall under the federal premerger notification reporting thresholds. Parties interested in providing information, which can be anonymous, must make their submissions to the enforcement agencies by September 20, 2024.

Section 7 of the Clayton Antitrust Act of 1914 prohibits mergers and acquisitions that substantially lessen competition or tend to create a monopoly. One of the ways the federal antitrust enforcement agencies monitor consolidation activity is through the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This act requires that parties to certain mergers, acquisitions, and joint ventures report detailed information about the transaction to the enforcement agencies through premerger notifications. Specifically, if a transaction value exceeds a threshold referred to as the size-of-transaction test—and, in many cases, the assets or annual net sales of the transaction parties exceed thresholds referred to as the size-of-person test—the transaction must be reported to the enforcement agencies. The enforcement agencies then have 30 days (which can be extended if additional information is required for the agencies to evaluate the transaction) to decide whether to clear the transaction. When premerger notifications are required, the parties may not close the transaction until the 30-day (or extended) waiting period expires.

To avoid scrutiny by the enforcement agencies, some companies will engage in serial acquisitions (also called roll-up activity). Under this strategy, a company will engage in a series of acquisitions, each

of which falls under the federal antitrust reporting thresholds, with the intent of quietly increasing market power and, in many cases, seeking to gain a monopoly position in the relevant product and geographic markets. Because each individual acquisition is not reportable to the enforcement agencies, the agencies may not learn of it and therefore may not investigate or challenge otherwise problematic transactions that substantially lessen competition or tend to create a monopoly.

Sections 4 and 16 of the Clayton Act create private rights of action whereby aggrieved parties can challenge transactions they believe cause harm to competition and seek both monetary damages and injunctive relief, including divestiture. While these private rights of action exist, they are very difficult to prosecute, and such challenges are rarely successful. One of the most difficult hurdles to overcome is proving “antitrust injury,” which has been defined by the U.S. Supreme Court as “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Put simply, the injury should be “the type of loss that the claimed violations . . . would be likely to cause.” *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969). Proving antitrust injury directly resulting from other parties’ combinations can be challenging.

Thus, historically, private parties have had little recourse in challenging serial acquisitions that create competition issues. In a positive development for parties harmed by serial acquisitions and industry roll-ups, the FTC and DOJ have begun to focus on this type of combination strategy. They recently launched a public investigation to identify and investigate such potentially unlawful combinations. As FTC Chairperson Lina Khan stated, “Firms can use serial acquisitions to roll up markets, consolidate power, and undermine fair competition, all while jacking up prices and degrading quality.” In furtherance of scrutinizing such “stealth consolidation schemes,” the FTC and DOJ jointly issued a request for information, inviting interested parties to report on serial acquisitions affecting commerce in all industries and sectors. The parties making the submissions can remain anonymous, and any stakeholder, including aggrieved customers, suppliers, and

competitors, can submit information.

The submissions are due by September 20, 2024, and Frost Brown Todd is actively assisting clients with preparing them. If you have observed or have information on serial acquisitions and industry roll-ups and would like to submit information to the enforcement agencies, please contact the author or any attorney with the firm's [Antitrust Practice](#) for assistance.

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