

FTC Commissioner Rohit Chopra Critical of Private Equity Roll-Ups of Healthcare Providers

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On July 8, 2020, Federal Trade Commissioner Rohit Chopra released a [statement](#) criticizing the practice of “roll-up transactions” involving multiple non-reportable transactions, [1] especially with regards to acquisitions of multiple health care providers. Since Republicans currently hold three of the five FTC Commissioner seats, Chopra’s comments likely do not signal a significant shift in antitrust enforcement priorities under the Trump administration. However, Chopra’s views would have greater weight under a Democratic administration, and given the FTC’s long-established focus on healthcare, buyers involved in multiple acquisitions in the healthcare sector should be prepared for heightened scrutiny. Chopra’s statement is also a reminder that the FTC and DOJ have the authority to investigate, and ultimately challenge or seek to unwind, any transaction - not just those that require HSR filings - even after the transaction has been consummated.

“Roll-up transactions” are common among private equity (PE) firms that employ “buy-and-build” strategies, which typically involve an initial takeover of a platform company with subsequent “bolt-on” and “tuck-in” acquisitions. PE firms often employ the strategy in an attempt to increase the overall valuation of the combined companies when they are eventually sold. The size of each individual transaction involved in roll-up transactions is typically below the HSR threshold, the individual acquisitions generally do not trigger HSR reporting and do not attract the attention of the FTC or DOJ until after they have closed.

While Commissioner Chopra acknowledged that roll-ups are occurring across many sectors of the economy, he expressed significant concerns about unreported roll-ups in the health care sector. In his statement, Chopra also expressed concern about private equity acquisitions of hospice care providers, air ambulances, certain physician practices, especially specialties like anesthesiology and emergency medicine, that are associated with surprise medical billing by out-of-network physicians and “body brokering” in the treatment of opioid dependency. Chopra’s statement was a continuation of his long-held scrutiny of private equity roll-ups, having previously issued a [2018 letter](#) to Congress regarding roll-ups in the opioid treatment sector.

Because of these concerns, Commissioner Chopra outlined several initiatives that he believes the FTC should undertake. First, he would like the FTC to actively identify enforcement targets in the health care sector who may be engaged in monopolization or who may have consummated mergers that reduced competition. Second, he encouraged the FTC to closely scrutinize any HSR filings by PE firms to gain insight into their acquisition strategies and to determine if future, non-reportable acquisitions may cause competition concerns. Third, he said that the FTC should consider whether changes to the HSR Act or its implementing regulations are needed to help the agency detect harmful roll-up activity.

As M&A activity returns to pre-COVID levels, PE firms and other buyers should be aware of the risks involved with multiple transactions in the same business sector, particularly in the health care sector, even if the HSR filings are not required. Buyers in strategic transactions should always consider the pro-competitive benefits of the transactions, and how they might respond to inquiries from antitrust enforcement agencies with competition concerns. Parties should also assume that all documents and communications related to the transaction may be subject to production requests and should avoid making statements which might be construed unfavorably if reviewed by the FTC or DOJ or state Attorneys General.

[1] Under the HSR Act, parties currently must notify the FTC and DOJ for transactions in excess of \$94 million. Transactions under this \$94 million threshold do not require a pre-closing notification to the agencies and therefore are considered “non-reportable.”

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