

JANUARY | 2024

# Key 2023 U.S. Federal Regulatory Developments for PE Sponsors

## Quick Takes

U.S. federal regulators were very busy in 2023, with significant activity in areas affecting private equity sponsors and their portfolio companies. In this issue, we highlight the key regulatory developments and preview some potential developments for 2024.

Looking at the overall market, 2023 was not a strong year for sponsor-related M&A. While the total deal value of both global and U.S. sponsor-related M&A remained relatively consistent throughout the year, the number of sponsor-related deals fell significantly over the course of the year. U.S. and global sponsor-related total deal value fell 41% and 40%, respectively, and the number of U.S. and global sponsor-related deals both fell 26% from the 2022 levels.

U.S. federal regulators were busy in 2023, including in areas affecting private equity sponsors and their portfolio companies. Below we highlight 2023’s key regulatory developments that impact private equity sponsors and preview some potential developments for 2024.<sup>1</sup>

## Antitrust Regulatory Updates

**FTC Proposal to Ban Employer-Worker Non-Compete Clauses:** In January 2023, the Federal Trade Commission (FTC) proposed a rule that would ban existing and new employer-worker non-compete agreements. The proposed rule purports to preempt all state and local laws that are inconsistent with its provisions. The FTC is currently reviewing comments on this proposed rule and reportedly may issue a final rule in 2024. For more, see [here](#).

The FTC’s proposal comes amid a push by many state legislatures and courts to ban or otherwise restrict non-compete agreements. California enacted legislation prohibiting non-compete agreements in September 2023. New York had proposed legislation (see [here](#)), but the bill was vetoed by Governor Hochul at the end of 2023. In addition, courts in some states (including Delaware – for more, see [here](#)) have declined to enforce or modify non-compete agreements in various contexts that the courts view as overly broad. Private equity sponsors and their portfolio companies should be mindful of the current law surrounding non-competes in relevant jurisdictions, including the company’s state of incorporation and places of business, as well as the location of the relevant employee.

Global Sponsor-Related M&A Activity



Source: Dealogic<sup>2</sup>

U.S. Sponsor-Related M&A Activity



Source: Dealogic<sup>2</sup>

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**2023 Merger Guidelines:** In December 2023, the Antitrust Division of the DOJ and the FTC issued the 2023 Merger Guidelines to replace the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. The new guidelines are a substantial departure from their predecessors in a number of respects, including by lowering the threshold market concentration level at which agencies would presume a merger to be illegal. For more, see [here](#).

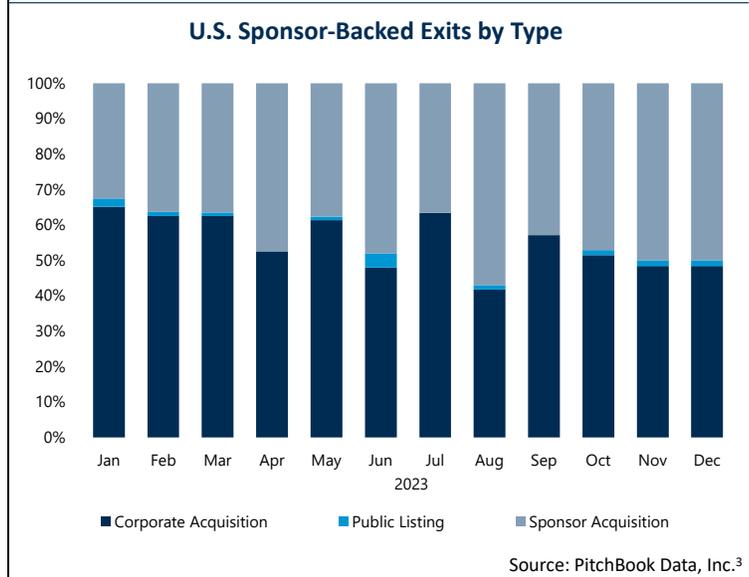
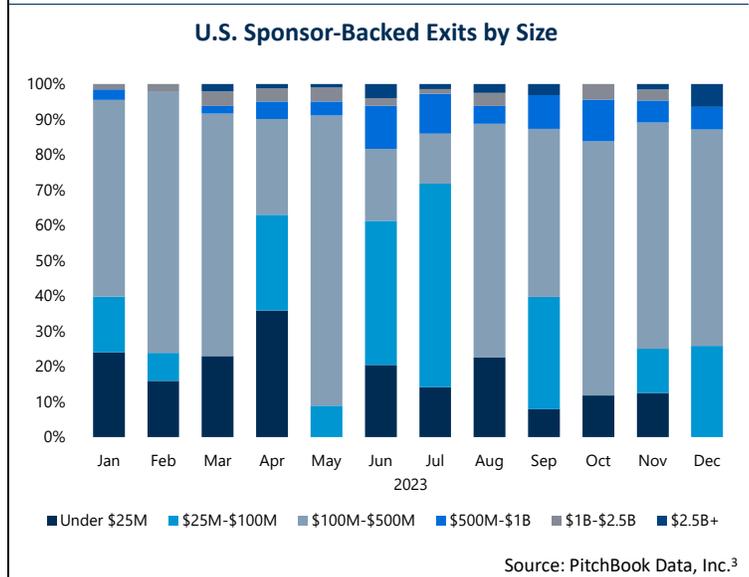
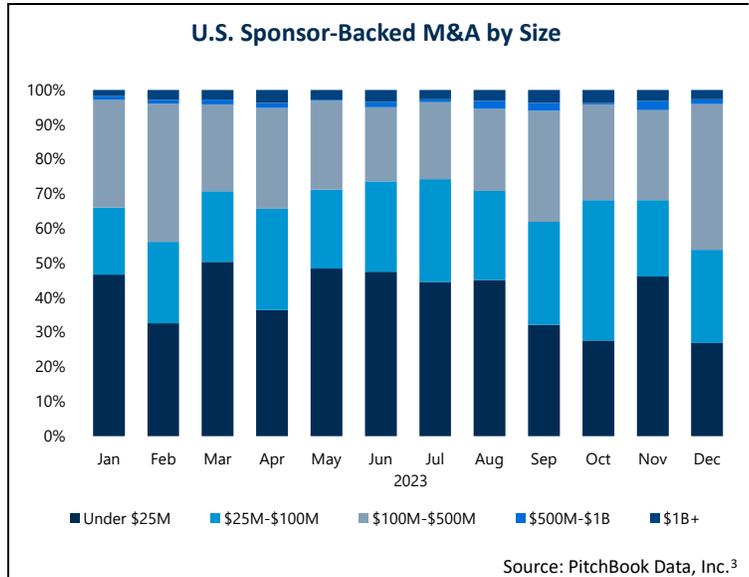
**White House Initiative Targeting Private Equity in the Health Care Sector, Including “Roll Up” Strategies:** In December 2023, the White House announced that the DOJ, FTC and Department of Health and Human Services will examine the role of private equity in competitive conditions in the health care sector and will work together to identify potentially anticompetitive health care roll-up transactions (i.e., acquiring and merging multiple companies in the same industry and consolidating them into a larger company) (for more, see [here](#)). This comes on the heels of a suit by the FTC in September 2023 against entities affiliated with a private equity firm and its partially owned portfolio company for allegedly pursuing an illegal “roll up strategy” (for more, see [here](#)). This was the Biden Administration’s first litigated case challenging roll-ups by a private equity firm.

**DOJ’s Ongoing Interlocking Directorates Enforcement:** The DOJ continued its focus on enforcing Section 8 of the Clayton Act, which prohibits directors and officers from serving simultaneously on the boards of competitors. In August 2023, the DOJ announced that its enforcement initiative had resulted in 15 interlocking director resignations from 11 boards. Compliance with Section 8 should be monitored periodically, especially in light of the DOJ’s ongoing attention to interlocking directorates. For more, see [here](#).

**Proposed Amendments to HSR Filing Requirements:** In June 2023, the FTC, in coordination with the Department of Justice (DOJ), proposed changes to the Hart-Scott-Rodino Act Form, adding numerous requirements, including extensive information disclosures relating to areas traditionally governed by other federal agencies. The additional requirements could prove extremely burdensome and time-consuming for filers. For more, see [here](#).

**Regulatory Updates for Private Funds**

**Private Fund Adviser Rules (PFAR):** In August 2023, the SEC adopted new rules and amendments under the Advisers Act that affect private fund advisers and their



related private fund activities. The PFAR, among other things: (i) require comprehensive quarterly reporting to investors concerning performance, compensation, fees and expenses; (ii) require registered advisers to obtain an annual audit for their private funds; (iii) require registered advisers to obtain a fairness opinion or valuation opinion and make certain disclosures in connection with adviser-led secondary transactions; (iv) prohibit charging certain fees and expenses without disclosure and, in some cases, investor consent; (v) prohibit reducing a clawback by the amount of certain taxes, unless disclosed; (vi) prohibit borrowing or receiving an extension of credit from a private fund without disclosure and investor consent; and (vii) impose limitations on and new disclosure requirements regarding preferential treatment of investors. The PFAR compliance dates are September 14, 2024 and March 14, 2025, depending on the specific PFAR requirement and the amount of private fund assets under management. Notably, the PFAR are being challenged by industry groups in litigation pending before the U.S. Court of Appeals for the Fifth Circuit. For more, see [here](#).

**Amendments to Form PF:** In May 2023, the Securities and Exchange Commission (SEC) adopted amendments to Form PF, the confidential reporting form for certain SEC-registered investment advisers to private funds. The amended Form PF, among other things, (i) requires quarterly event reporting on all private equity fund advisers for certain triggering events including the removal of a general partner, certain fund termination events and the occurrence of an adviser-led secondary transaction and (ii) adds annual reporting requirements for “large” private equity fund advisers, including on the occurrence of any GP clawback or LP clawback. It also requires more detailed disclosure on fund investment strategies, fund-level borrowings, events of default, bridge financings to controlled portfolio companies and geographic breakdowns of investments. The amendments are designed to enhance the ability of the Financial Stability Oversight Council to assess systemic risk and to bolster the SEC’s oversight of private fund advisers and its investor protection efforts. The compliance date for quarterly event reporting was December 11, 2023, and the compliance date for the annual event reporting is June 11, 2024. For more, see [here](#).

## Foreign Direct Investment Updates

**New CFIUS Guidance Regarding the “Completion Date” of a Transaction:** In May 2023, the Committee on Foreign Investment in the United States (CFIUS) issued a new FAQ providing its interpretation that the “completion date” for will be the “earliest date upon which the [non-U.S.] person acquired any of the equity interest”. Thus, parties subject to mandatory filing will no longer be able to use springing structures to close the equity investment and then make a subsequent filing covering the consent or governance rights. For more, see [here](#).

**CFIUS Scrutiny of Funds Granting Certain Rights to Non-U.S. LPs:** In May 2023, CFIUS confirmed in FAQs that it will continue to request follow-up information with respect to non-U.S. investors that are involved in a transaction, including the identities of LPs in an investment fund. CFIUS may also request information on any governance or contractual rights that non-U.S. investors may hold in an acquirer or the U.S. business. Sponsors should be aware that they may be required to disclose information on their non-U.S. and non-U.S.-controlled investors despite any confidentiality obligations. For more, see [here](#).

**Outbound Investment Executive Order:** In August 2023, President Biden issued a long-awaited Executive Order establishing a new Outbound Investment Program to regulate certain outbound U.S. investments to China (including Hong Kong and Macau) in several technology sectors relevant to military, intelligence, surveillance or cyber-enabled capabilities. For more, see [here](#).

## SEC Disclosure/Reporting Updates

**New Proxy Vote Disclosure Requirements for Investment Managers:** In November 2022, the SEC adopted amendments to Form N-PX and adopted new Rule 14Ad-1 under the Exchange Act, which require “institutional investment managers” (i.e., a person that (i) is an “institutional investment manager” as defined in the Exchange Act and (ii) is required to file Form 13F reports under section 13(f)-1 of the Exchange Act) to publicly disclose information about their proxy votes regarding say-on-pay votes, absent certain exceptions. Rule 14Ad-1 and the amendments to Form N-PX will be effective on July 1, 2024 for votes occurring during the period from July 1, 2023, to June 30, 2024. The first reports required under the rule and amended Form N-PX will be due by August 31, 2024. For more, see [here](#).

**Changes to Schedule 13D/G Reporting:** In October 2023, the SEC amended the rules governing the reporting of beneficial ownership of securities on Schedules 13D and 13G. Among other things, the amendments accelerate the deadlines by which the schedules must be filed. While the SEC decided not to adopt proposed rules regarding group formation and the treatment of cash-settled derivatives as conferring beneficial ownership, it issued guidance on the former, and clarified that cash-settled derivatives must be disclosed on Schedule 13D under Item 6. The amendments go into effect on February 5, 2024, though Schedule 13G filers will have until September 30, 2024 to comply with the accelerated filing deadlines. For more, see [here](#).

**Short Sale Disclosures:** In October 2023, the SEC adopted new Rule 13f-2, which requires institutional investment managers that meet or exceed certain thresholds to report on Form SHO specified short position data and short activity data for equity securities. The SEC will aggregate the resulting data by security, thereby maintaining the confidentiality of the reporting managers, and publicly disseminate the aggregated data via EDGAR on a delayed basis. The rule went into effect on January 2, 2024, and reporting will be required commencing January 2025. For more, see [here](#).

## Other Regulatory Updates

**M&A Safe Harbor:** In October 2023, the DOJ announced a new Mergers & Acquisitions Safe Harbor policy pursuant to which an acquiring company that discloses potential wrongdoing at a company being acquired within six months of either side of the deal closing date – and fully cooperates and remediates the underlying problems within a year of closing – can presume it will not be prosecuted by the DOJ. For more, see [here](#).

**Beneficial Ownership Reporting under the Corporate Transparency Act:** The Beneficial Ownership Reporting Rule under the Corporate Transparency Act went into effect on January 1, 2024. The Beneficial Ownership Reporting Rule requires certain domestic and non-U.S. entities to report previously unrequired information about such entities as well as their beneficial owners to the Financial Crimes Enforcement Network (FinCEN) or face potential civil and criminal penalties for non-compliance. Such information will be maintained by FinCEN in a database and only available to law enforcement agencies meeting certain criteria. While pooled investment vehicles and operating companies that meet certain conditions are each exempt from the reporting requirements, as are registered investment advisers, other related entities will require careful analysis to determine whether the requirements of the Beneficial Ownership Reporting Rule are applicable and, if so, whether such entities may rely on any of the available exemptions from the rule. For more, see [here](#).

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- <sup>1</sup> This article focuses primarily on U.S. federal regulatory developments and does not discuss state-level or non-U.S. regulatory developments. We also do not cover ESG developments.
  - <sup>2</sup> Sponsor categorization determined by Dealogic; as of January 18, 2024. Deal volume by dollar value is calculated from the subset of deals that include a disclosed deal value. Paul, Weiss has not reviewed data for accuracy.
  - <sup>3</sup> Data provided by PitchBook Data, Inc. as of January 18, 2024. PitchBook's current data [methodology](#) includes all announced or completed deals or exits. Sponsor and exit type categorizations determined by PitchBook. Paul, Weiss has not reviewed data for accuracy.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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