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Recent Antitrust Division Statements Suggest Close Attention to Deals Involving Private Equity

The federal antitrust agencies are increasingly focused on issues of particular relevance to private equity funds. In a memo last September, the FTC Chair asserted that "the growing role of private equity and other investment vehicles invites us to examine how these business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations." More recently, Jonathan Kanter, the assistant attorney general in charge of the Antitrust Division at the DOJ, has spoken about potential competitive issues in private equity deals, including roll ups, the involvement of private equity in divestiture remedies and enforcement of the law concerning interlocking directorates. In a recent interview with the *Financial Times* he said that private equity deals are "top of mind" for him and his staff.

Roll ups. In the interview, Mr. Kanter stated that a roll up strategy is a "business model [that] is often very much at odds with" antitrust laws "and very much at odds with the competition we're trying to protect." As a result, he said, if the DOJ is "going to be effective, we cannot just look at each individual deal in a vacuum detached from the private equity firm." In line with these statements, funds can expect that they or their portfolio companies will increasingly be asked wide-ranging questions about strategies in certain merger reviews. More broadly, in light of Mr. Kanter's statements and the DOJ and FTC's recently issued call for comments on the agencies' merger guidelines (which asks whether "the guidelines' approach to private equity acquisitions [is] adequate"), it would not be surprising to see private equity roll ups addressed in future merger guidelines.

Acquisitions of divestiture assets. As we wrote in January, Mr. Kanter has expressed some skepticism about divestitures as remedies in merger matters in general. He stated then that while divestitures will be an option in certain circumstances, in his view "those circumstances are the exception, not the rule." He returned to the topic of divestitures in a speech last month, expressing a concern that "divestitures may not fully preserve competition across all its dimensions in dynamic markets." In that speech, he went on to single out private equity purchasers, saying that "too often partial divestitures ship assets to buyers like private equity firms who are incapable or uninterested in using them to their full potential." He continued this theme in the *Financial Times* interview, saying: "Very often settlement divestitures [involve] private equity firms [often] motivated by either reducing costs at a company, which will make it less competitive, or squeezing out value by concentrating [the] industry in a roll-up." Those involved in deals where a private equity fund is part of a potential remedy should take Mr. Kanter's assertions into account when advocating for the remedy.

Interlocking directorates. In general, Section 8 of the Clayton Act prohibits a person from simultaneously serving on the board of two competing corporations unless the criteria for de minimis exceptions are met. Historically, when the DOJ became aware of a potential Section 8 issue (typically during review of a proposed transaction), the matter was often resolved by the director resigning from a board. In certain instances, the DOJ issued a public statement about the matter. Recent statements by the Mr. Kanter suggest that future Section 8 violations may be treated differently. In April, he gave a speech in which he suggested that the DOJ would "not hesitate to bring Section 8 cases to break up interlocking directorates." He reiterated the Antitrust Division's attention to interlocking directorates in the *Financial Times* interview, saying "we're going to enforce" Section 8. These statements – along with Mr. Kanter's other statements about his willingness to litigate – suggest that Section 8 issues may be more onerous to resolve going forward. It may be that the DOJ will now insist on a consent decree, which would require a court filing, a period for public comment and eventual approval by a judge. As such, private equity funds should pay particular attention to potential Section 8 issues when structuring deals, and should periodically evaluate their portfolios for these issues as companies' businesses evolve. Indeed, companies that are not initially competitors may become competitors as product and service lines change.

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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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