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DOJ Antitrust Head Signals Aggressive Enforcement against Private Equity Transactions

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US antitrust enforcers have signaled that private equity firms are the prime targets for upcoming aggressive antitrust merger enforcement. In a recent interview, US Assistant Attorney General Jonathan Kanter stated that the motive of a private equity firm may be "designed to hollow out or roll up an industry and essentially cash out," which "is often very much at odds with the law, and very much at odds with the competition we're trying to protect."[1] His comment comes after Lina Khan, the current Federal Trade Commission (FTC) Chairwoman, stated that private equity roll-ups would be a focal point for the FTC.[2] It is not entirely unsurprising that progressive antitrust enforcers are focusing on private equity after the industry announced a record 14,730 deals last year globally worth $1.2 trillion, which was nearly double the previous high in 2007.[3] The above comments provide several key takeaways for stakeholders going forward:

- As a general matter, these statements further solidify the notion that antitrust merger enforcement is going to continue to be extremely aggressive and indicate that the US Department of Justice (DOJ) and the FTC may closely scrutinize private equity transactions even if there is no obvious horizontal or vertical issue. For example, the DOJ and the FTC have already started investigating less traditional theories of harm, such as the impact on labor and the environment.

- Private equity firms should expect the potential for heightened scrutiny in instances where a private equity firm has engaged in serial acquisitions within the same industry (known as roll-up transactions), especially in healthcare-related fields. It will be important for stakeholders to not only evaluate the current acquisition for competitive issues, but to also consider the impact of a long-term "roll-up" plan and its influence on pricing, service, and quality.

- Watch for agencies to bring more Clayton Act Section 8 cases, which prohibits interlocking directorates (aka a single firm appointing officers and directors at multiple competitors).[4] Private equity firms often will appoint personnel to the boards of the firm's portfolio companies, which may consist of horizontal competitors. Going forward, these

appointments will require additional attention to avoid running afoul of Section 8.

- The DOJ and the FTC will also have an enhanced focus on the impact of private equity firms acting as divestiture buyers when the agency orders merging parties to divest assets to preserve competition. Assistant Attorney General Kanter stated, "[I]n many instances, divestitures that were supposed to address a competitive problem have ended up fueling additional competitive problems."[5]

While the degree to which agencies will more closely scrutinize private equity transactions remains unclear, it is crucial for private equity firms to engage antitrust counsel early in the transaction process both to evaluate the transaction at hand, as well as any future transactions that may, together, bring about enhanced regulatory scrutiny.

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[1] Stefania Palma and James Fontanella-Khan, "Crackdown on buyout deals coming, warns top US antitrust enforcer," *Financial Times* (May 18, 2022),

[2] "Remarks of Chair Lina M. Khan regarding the Request for Information on Merger Enforcement Docket No. FTC-2022-0003," Federal Trade Commission (Jan. 18, 2022),

[3] Palma *supra* at 1.

[4] *Id.* at 3.

[5] *Id.* at 2.

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