Private Equity Subject to Increased Antitrust Scrutiny from DOJ

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Key Takeaways:

- Transactions involving private equity should expect to face antitrust concerns from the DOJ that go beyond the question of how many competitors will remain afterwards, even if the transactions do not trigger an HSR filing.
- Private equity firms should carefully, and immediately, review their existing board appointments and any future appointments to avoid illegal interlocking directorates.
- HSR filings may seem like a hassle, but the Foley Hoag team is dedicated to making it as easy as possible. Attracting unwanted and unnecessary antitrust scrutiny due to "filing deficiencies" can have significant consequences that are easily avoidable.

In his first public remarks as Deputy Assistant Attorney General of the United States Department of Justice Antitrust Division (DOJ), Andrew Forman announced that the DOJ is "thinking a lot about enhancing antitrust enforcement around a variety of issues surrounding private equity" especially in the health care sector. In particular, Forman pointed to four areas of enforcement that the DOJ is "thinking" more about.

First, Forman emphasized that the DOJ continues to focus on potential antitrust enforcement of private equity's use of "roll-ups." "Roll-up" strategies involve the acquisition of multiple smaller players in an industry in order to create a single large player. The DOJ is concerned that roll-ups can cumulatively or otherwise lead to a substantial lessening of competition that may lead to a monopoly. Similarly, Forman said that the DOJ "will analyze whether private equity companies may violate the antitrust laws with investments creating or enhancing power across a 'stack' of technology or other products/services."

Second, Forman stated that the DOJ is "focused on whether certain private equity investments may chill fierce competition on the merits." Specifically, the DOJ is concerned about certain private equity investments that "may either blunt the incentive of the target company to act as a maverick or a disruptor in health care markets or otherwise cause the target company to focus solely on short-term financial gains and not on advancing innovation or quality."

Third, Forman highlighted the potential for significant new enforcement of the prohibition of interlocking directorates. Subject to certain exceptions, a prohibited interlocking directorate can occur when the same person serves as an officer or director of two or more competing companies. Importantly, and particularly relevant for private equity investors, the requirement for an interlocking "person" should be read as "representative," not an individual person. The FTC and DOJ take the position that an interlocking directorate can exist if different persons serve on different boards or officer slates, but those different persons are representatives of the same corporation (e.g., both are officers of the same private equity firm). To the extent that private equity investments in competitors leads to interlocking directorates, Forman stressed that the DOJ is committed to taking "aggressive action" including the possibility of initiating litigation against violators.

Fourth, Forman said that the DOJ has recently become aware of some Hart-Scott-Rodino premerger notification (HSR) "filing deficiencies in the private equity space." As a result, according to Forman, the DOJ is concerned that private equity firms "may not be taking seriously enough their obligations under the HSR Act" and will be evaluating what, if any, next steps to take to increase compliance.

Forman's remarks echo similar statements made recently by his boss, Assistant Attorney General Jonathan Kanter, and the Chair of the

Federal Trade Commission (FTC) Lina Khan in separate interviews earlier this year with *Financial Times*.

Private equity firms—particularly those with investments in the health care sector—should be aware that antitrust enforcers will be carefully scrutinizing their transactions, regardless of whether or not they make a filing pursuant to the HSR Act, and their portfolio company board appointments. In order to avoid unnecessarily attracting the attention of the DOJ or the FTC, private equity firms should involve antitrust counsel in all acquisitions and should carefully review their existing board appointments.

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