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## Increased Clayton Act Section 8 Enforcement Will Likely Impact Private Equity Firms

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The Antitrust Division of the Department of Justice (the “Division”) has continued its scrutiny of private equity by announcing its investigation into interlocking directorates, which led to the resignation of several directors. Historically, Section 8 of the Clayton Act (15 U.S.C. § 19), also known as interlocking directorates, has been seldom utilized by both the Federal Trade Commission (“FTC”) and the Division outside of the merger context.<sup>1</sup> However, Assistant Attorney General for Antitrust Jonathan Kanter has recently signaled a shift, claiming that “Competitors sharing officers or directors further concentrates power and creates the opportunity to exchange competitively sensitive information and facilitate coordination — all to the detriment of the economy and the American public.”<sup>2</sup> The Division has indicated that these investigations are merely “the first in a broader review of potentially unlawful interlocking directorates.”<sup>3</sup>

An interlocking directorate occurs when a person serves as an officer or director of two corporations.<sup>4</sup> The Clayton Act defines “person” broadly “to include corporations and associations.”<sup>5</sup> While they are generally legal, interlocking directorates between competing corporations are prohibited by Section 8 due to their potential to facilitate the exchange of competitively sensitive information or coordination between competing firms. Violations of Section 8 are per se violations, meaning that a lack of competitive injury will not excuse the parties from liability unless one of the de minimis exceptions applies. Information exchanges through interlocking directors may also violate Section 1 of the Sherman Act if the exchanges facilitate collusion between the two corporations.<sup>6</sup> In addition, in its November 20, 2022 new Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, the FTC also indicated that they will use Section 5 of the FTC Act to challenge “[c]onduct that violates the spirit of the antitrust laws . . . including . . . “interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act.”<sup>7</sup>



The focus on interlocking directorates in the private equity context continues the FTC and DOJ's scrutiny of the industry. Private equity is a high-priority enforcement area, with both agencies expressing concerns about "serial acquisitions" and "roll out" acquisitions that enable these firms to gain market power. FTC Chairperson Lina Khan cites the ability of these practices to "reduce incentives to compete, potentially leading to increased prices and degraded quality."<sup>8</sup> According to Kanter, these transactions are sometimes "designed to hollow out or roll up an industry and essentially cash out."<sup>9</sup> This practice, to Kanter, "is very much at odds with the law, and very much at odds with the competition we're trying to protect."<sup>10</sup>

The FTC and DOJ also have raised concerns regarding private equity as divestiture buyers. In a recent speech, Jonathan Kanter singled 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."<sup>11</sup> In another speech, he stated that "[v]ery 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."<sup>12</sup> FTC Chairman, Lina Khan, has also been critical of private equity, stating 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."<sup>13</sup>

In light of agency comments and investigations, private equity firms should remain mindful that the FTC and DOJ are watching their industry. Careful attention to document creation and working with antitrust counsel to develop a procompetitive narrative supported by customers is critical to withstand FTC and DOJ scrutiny of industry roll-ups and divestiture acquisitions. In addition, where a private equity firm's non-controlling investments lead to representation on the boards of companies that could be deemed to be competitors, such firms should consult with antitrust counsel to ensure that their board representations do not give rise to an unlawful interlocking directorate.

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<sup>1</sup> Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit, U.S. Dep't of Just. (Apr. 4, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>.

<sup>2</sup> Directors Resign from the Boards of Five Companies in Response to the Justice Department Concerns about Potentially Illegal Interlocking Directorates, U.S. Dep't of Just. (Oct. 9, 2022), <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>.

<sup>3</sup> *Id.*

<sup>4</sup> 15 U.S.C. § 19(a)(1). See also See FTC Blog Post "Have a plan to comply with the bar on horizontal interlocks," Debbie Feinstein (January 23, 2017) <https://www.ftc.gov/news-events/blogs/competition-matters/2017/01/have-plan-comply-bar-horizontal-interlocks>; Brief for the United States as Amicus Curiae, Reading Int'l v. Oaktree Capital Mgmt. (Oct. 1, 2003), <https://www.justice.gov/atr/case-document/brief-united-states-amicus-curiae-13>.

<sup>5</sup> 15 U.S.C. § 12(a).

<sup>6</sup> 15 U.S.C. § 1.

<sup>7</sup> Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf),

<sup>8</sup> Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, In the Matter of JAB Consumer Partners SCA SICAR, National Veterinary Associates, Inc., and SAGE Veterinary Partners, LLC, File No. 211 0140 (June 13, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioner-rebecca-kelly-slaughter-commissioner-alvaro-m-bedoya>.

<sup>9</sup> Competition Policy International, *DOJ's Kanter Warns Firms of Tougher Regulatory Review*, (May 19, 2022), <https://www.competitionpolicyinternational.com/dojs-kanter-warned-buyout-firms-that-they-may-face-tougher-regulatory-review/>.

<sup>10</sup> *Id.*

<sup>11</sup> Assistant Attorney General Jonathan Kanter Delivers Remarks at the University of Chicago Stigler Center, "Antitrust Enforcement: The Road to Recovery," U.S. Dep't of Just. (Apr. 4, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler>.

<sup>12</sup> Stefania Palma and James Fontanella-Khan, "Crackdown on buyout deals coming, warns top US antitrust enforcer," Financial Times (May 18, 2022).

<sup>13</sup> Lina Khan, "Vision and Priorities for the FTC Memorandum," (Sept. 22, 2021),

[https://www.ftc.gov/system/files/documents/public\\_statements/1596664/agency\\_priorities\\_memo\\_from\\_chair\\_lina\\_m\\_khan\\_9-22-21.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf).