Proposed Changes to HSR Notification Form Would Intensify Scrutiny on Private Equity Funds: Some Thoughts on What to Expect and How to React

JULY 18, 2023

Background

As described in our Client Alert of July 6, 2023, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) proposed on June 27, 2023, a massive overhaul of the Hart-Scott-Rodino Act (HSR) pre-merger notification form. We focus here on antitrust risk and burden implications for private equity transactions specifically. The proposed new form would greatly expand the information and documents that parties must submit with their HSR notification. Both the FTC and the DOJ have recently voiced intensive concerns regarding the perceived anticompetitive effects of private equity strategies involving an investment in an initial platform company in a particular industry followed by that platform pursuing follow-on acquisitions in the same industry. Several state attorneys general have also criticized private equity strategies and sought to block transactions involving platform companies. The proposed new form would give the antitrust authorities new tools to use the HSR pre-merger notification process to launch more frequent, and more robust, investigations into transactions involving private equity funds and their platform companies, while greatly increasing the burdens associated with antitrust notifications of even non-controversial transactions.

The antitrust agencies' special scrutiny of private equity transactions was made clear when, in reporting to Congress, then FTC Commissioner Rohit Chopra singled out private equity as an enforcement target, observing that their "buy-and-build" strategies enable them to "quietly increase market power and reduce competition," facilitating "a higher valuation when the combined company is eventually sold."[1] Later, FTC Chair Lina Khan described private equity buy-and-build strategies

[1] Rohit Chopra, Commissioner, Federal Trade Commission, Statement of Commissioner Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino-Annual Report to Congress, Commission File

as an “extractive business model” and declared industry consolidation through private equity transactions a top enforcement priority.[2] Assistant Attorney General for Antitrust Jonathan Kanter later echoed these concerns, stating that “[s]ometimes [a private equity firm’s strategy is] designed to hollow out or roll up an industry and essentially cash out,” and closer assessment of private equity transactions is “top of mind.”[3] The agencies have backed up their statements with recent enforcement actions against, and investigations of, private equity funds and their platform companies. For instance, the FTC recently challenged a private equity firm’s series of acquisitions of veterinary clinics.[4]

State attorneys general have expressed similar concerns regarding private equity business practices; some have taken action to block business combinations involving platform companies. For example, in his complaint seeking to temporarily block the merger of two private equity-backed grocery chains, Albertsons and Kroger, District of Columbia Attorney General Karl Racine described the merger as a “private equity cash-grab.”[5] Additionally, Massachusetts Attorney General Andrea Campbell and New York Attorney General Letitia James led a coalition of 18 attorneys general supporting a rule proposed by the U.S. Department of Health and Human Services and the Centers for Medicare and Medicaid Services intended to enhance disclosure of private equity investors and real estate investment trusts in skilled nursing facilities; these attorneys general allege such investors’ influence contributed to the “root causes” of substandard care at several chains.[6] The confluence of antitrust enforcers’ focus on private equity deals and the proposed new HSR form makes it imperative that private equity funds and their platform companies rigorously re-evaluate their strategies for minimizing antitrust risk and burden and prepare for dealmaking in a new era for HSR notifications and enforcement. Private equity firms need to plan carefully how to manage, among other things:

- new requirements for extensive narrative descriptions bearing on the agencies’ assessment of potential antitrust concerns;

No. P110014, https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf.

[2] Chris Cumming, “Antitrust Regulators Fix Their Sights on Private Equity,” Wall Street Journal, Sept. 30, 2021. See also Khan Memo to Staff (Sept. 22, 2021) https://www.wsj.com/articles/antitrust-regulators-fix-their-sights-on-private-equity-11632999600.

[3] Stefania Palma & James Fontanella-Khan, “Crackdown on buyout deals coming, warns top US antitrust enforcer,” Financial Times (May 19, 2022) https://www.ft.com/content/7f4cc882-1444-4ea3-8a31-c382364aace1.

[4] FTC, “FTC Takes Second Action Against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm’s Rollup of Veterinary Services Clinics,” (Jun. 29, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-second-action-against-jab-consumer-partners-protect-pet-owners-private-equity-firms-rollup-of-veterinary-services-clinics.

[5] Press Release, Karl A. Racine, District of Columbia Attorney General, “AG Racine Sues Albertsons and Kroger in Federal Court to Halt $4 Billion Cash Handout to Shareholders,” (Nov. 2, 2022), https://oag.dc.gov/release/ag-racine-sues-albertsons-and-kroger-federal-court.

[6] Andrea Joy Campbell, Massachusetts Attorney General, Letitia James, New York Attorney General, et al., “Disclosure of Ownership Information in Nursing Facilities,” (Apr. 14, 2023), https://ag.ny.gov/sites/default/files/letters/Letter%20from%20State%20AGs%20to%20CMS%20re%20Proposed%20Rule%20on%20Nursing%20Home%20Transparency.pdf.

- enormously expanded document submission requirements, which will present new challenges for document creation and impose much more burden than the current form; and
- newly mandated disclosures of information regarding prior acquisitions, minority interest holders and other perceived influencers, and board observer interlocks that may give fodder for the agencies' focus on unconventional theories of competitive harm and heightened scrutiny of director and officer interlocks.

The federal agencies' proposal is subject to notice and comment until August 28, 2023, and the final form may reflect material alterations from the proposal, but major changes from the existing rules are likely to survive. The proposed new HSR form's effective date is undetermined, but it may not be for a year or so. It is, however, not too early for private equity funds to start preparing for sweeping changes, especially given that many firms are likely now evaluating future investment strategies and potential transactions that might not be signed until the new form is in place.

We outline below the most significant proposed changes to the HSR form for private equity firms and their platform companies and strategies to account for and respond to the proposed changes.

Expansive Narrative Disclosure

- **Horizontal and Vertical Relationships:** The proposed new form would require narrative descriptions of all markets in which the reporting parties currently compete or are expected to compete in the future (horizontal relationships) or are in a supplier-customer relationship (vertical relationships). In the context of a sponsor's initial platform company investment, it is unclear what this requirement would mean for the sponsor's newly formed acquisition vehicle because in the strictest sense, the only business the acquiring party conducts will be the business it acquires from the acquisition target. Horizontal or vertical relationships between the newly acquired platform and any other portfolio companies of the sponsor, however, could trigger the description requirement. And, as discussed below, other parts of the new form will require disclosure of other information regarding a sponsor's investments in other companies in either the same industry as the target or a related industry. In some circumstances, the expansive narrative descriptions and additional disclosure called for by the proposal could lead to agency questions regarding potential overlaps or vertical relationships even though the notifying private equity firm or platform company would consider its pre-transaction operating business(es) or investment interests to be in adjacent, rather than overlapping or vertically related, relationship(s) to the acquired firm.

  The notifying parties would also be required to list for each market with a vertical or horizontal relationship, customer information (including contact information for the top 10 customers), a description of any licensing arrangements, and any non-compete or non-solicitation agreements involving relevant employees or business units.

These new requirements would have important implications for notifying parties of all types. For instance, the agencies would now have information to contact customers immediately post-notification and for all transactions, not just the subset of potentially problematic transactions for which the agencies currently request customer contact information during an initial review. That could prove highly disruptive to the businesses of the reporting parties, and require the parties to give careful thought to their approach to the timing, nature, and content of any transaction-related customer outreach. How leading customers are likely to view the transaction and respond to agency inquiries would be an even more important consideration for assessing antitrust risk, especially for transactions that might have been expected to avoid an intensive investigation under the agencies' traditional practices. The required disclosures of non-compete and non-solicitation agreements could spur antitrust investigations in an area where both agencies are heavily focused.

The requirements that merging parties describe all horizontal and vertical relationships with one another will bring special potential pitfalls for private equity firms. All merging parties with potentially significant relationships will need to thoughtfully consider how to define and describe the relevant markets because that might have enormous implications for whether an agency undertakes an investigation, and if so, the form the investigation takes. But for private equity firms that contemplate future transactions involving the acquired platform, positions on market definition could have vital consequences not only for the transaction currently being reported but also for future ones. Once a firm takes a position about market definition for one transaction, it will be very hard to take a different position for a future deal. For funds that organize their investments by industry verticals or that predominantly invest in only one industry, how markets are defined for transactions involving specific platform companies within the fund could substantially affect antitrust risk. In developing positions, therefore, it will be crucial to consider not only the current acquisition but how a given market definition may affect antitrust risk for future deals.

- **Strategic Rationale:** Each merging party would be required to "describ[e] all strategic rationales for the transaction, including, for example, those related to competition for current or known planned products or services that would or could compete with a current or known planned product or service of the other party, expanding into new markets, hiring the seller's employees (so called acqui-hires), obtaining certain intellectual property, or integrating certain assets into new or existing products, services or offerings." The notifying parties will also be required to identify which documents submitted with the HSR form support their narrative description.

This requirement may raise special challenges for private equity funds. Both the FTC and the DOJ are heavily focused on purported threats to competition from sponsor-driven strategies that have been a mainstay of private equity investing for decades such as sequential transactions in the same space. For private equity investors, then, it will be important to describe the deal rationale carefully, fully, and accurately to avoid statements that may be misconstrued. There are commonly good, procompetitive reasons for private equity add-on acquisitions – for instance, creating best-in-class management teams, lowering operating costs, expanding into new regions or complementary product or service lines, enhancing relationships with existing customers, or gaining new customers for existing offerings. It will be important to identify and explain these rationales and avoid statements that could be misconstrued to suggest that the purpose of the initial or future transactions is to gain market power. For initial platform company acquisitions, because the value of the investments can depend significantly on future opportunities for growth through acquisition, it may prove especially helpful to describe why planned growth through acquisitions will be affirmatively procompetitive, as is often the case, especially for investments in middle and lower middle markets.

– **Labor-Related Information:** Both antitrust agencies have made enforcement against employer conduct that they contend harms competition in labor market a huge priority. The FTC has proposed new rules that would ban almost all employee non-competes. The DOJ has brought six recent criminal cases based on allegedly illegal agreements among employers not to hire or solicit each other's employees.[7] Restrictive covenants regarding hiring of employees in connection with transactions are also a focus of enforcement actions.[8] And both agencies have said they will continue to scrutinize how transactions might harm competition in labor markets.[9]

  Consistent with this agency focus, the proposed new HSR form would require each notifying party to "provide certain information about its workers in order to screen for potential labor market effects arising from the transaction." Each party would need to disclose (a) headcount for its five largest occupational categories; (b) headcount by commuting zone – geographic units reflecting where people live and work, designed by the Department of Agriculture's Economic Research Service – for the five largest

[7] See U.S. v. Jindal (2020), U.S. v. DaVita (2021), U.S. v. Patel (2021), U.S. v. Surgical Care Affiliates (2021), U.S. v. VDA OC LLC and Hee (2021), and U.S. v. Manahe (2022). See our alert on no-poach criminal investigations.

[8] See FTC Proposed Non-Compete Clause Rulemaking (Jan. 5, 2023), which would ban nearly all non-compete agreements between employers and their employees, https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule.

[9] The DOJ obtained a permanent injunction against Penguin Random House's proposed acquisition of Simon & Schuster based on alleged harms to authors/workers (Oct. 31, 2022); see also FTC Chair Lina M. Khan, Remarks of Chair Lina M. Khan at the Joint Workshop of the FTC and the DOJ, Making Competition Work: Promoting Competition in Labor Markets (Dec. 6, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598791/remarks_of_chair_lina_m_khan_at_the_joint_labor_workshop_final_139pm.pdf.

occupational categories for which both parties have employees; and (c) any penalties or investigations for labor-related violations over the last five years.

These occupational categories would be based on the Bureau of Labor Statistics' Standard Occupation Classification System, which is not widely used by most companies. Under that system, workers are classified into one of 867 detailed occupations, and detailed occupations are further combined to form 459 broad occupations, 98 minor groups, and 23 major groups.

These requirements would arm the agencies with data to investigate whether a transaction might harm competition in a narrow candidate labor market – say electrical engineers in Boise, Idaho – by combining leading employers in such a market. They would impose significant burdens for many notifying parties and could flag for investigation possible antitrust issues in an area that the agencies are scrutinizing very closely.

The requirements would raise particular challenges for many private equity transactions. Platform companies, especially those in the middle or lower middle markets, lack the technical expertise and resources necessary to track their employees using such a complex classification system, and some lack any internal legal or human resources function at all. Moreover, many equity arrangements entered into with management teams, including rollover equity participants, contain restrictive covenants and confidentiality obligations designed to protect investors (including fellow management members) from conduct by other employee-owners that could create investment risk for all. Those provisions could become targets for antitrust scrutiny, especially given the expanded document disclosure obligations described next.

Expanded Document Submissions

The proposed new HSR form will also greatly expand the volume and types of documents that must accompany the 4(c) filing. These requirements will create significant challenges and potentially more antitrust risk. Parties will need to be even more vigilant to avoid creating documents that could mislead regarding competitors or competition or otherwise engender an investigation that might not have occurred but for unhelpful documents. The expanded document submission requirements will bring an especially high risk of pitfalls for many private equity firms, given their diverse set of portfolio companies and potential inconsistencies in thoroughness and thoughtfulness of document creation.

- **Drafts:** The current HSR form requires that parties submit only final versions of Item 4(c) and 4(d) documents – competition/markets/synergy documents or third-party advisor documents, analyzing the transaction and prepared by or for an officer or director. The proposed form would greatly expand the potential range of 4(c)/4(d) documents by requiring not just the final version of such documents but also drafts that are provided to an officer, director, or supervisory deal team lead (see next bullet). For private equity, the expanded definition could capture documents regarding nearly every aspect of a transaction, such as plans for management presentations, drafts of documents the content of which never makes it into investment committee memos, and draft discussions regarding add-on acquisition plans and strategies (both long- and short-term). Given the typically rigorous internal processes and workstreams sponsors employ in formulating and executing acquisition strategies, private equity firms and platform companies will often generate very large volumes of draft 4(c) documents, which could have to be submitted with the new HSR form. Firms and their counsel are currently able to review draft 4(c) documents before they become final to ensure precision and accuracy in the final version that is submitted with the HSR form. But with the proposed new form, that would not be sufficient to minimize the risk of misleading or inaccurate content in a 4(c) submission. It will now be especially important to effectively train all employees who may be drafting 4(c) documents to be fully accurate and precise and closely monitor drafting activities for this purpose.

- **Supervisory Deal Team Documents:** The proposed new form would also expand the range of 4(c) documents by requiring submission of documents that are prepared by or for "supervisory deal team leads," not just officers and directors. A supervisory deal team lead would be any "individual or individuals who functionally lead or coordinate the day-to-day-process for the transaction." For private equity firms, this could include investment committee members, senior members of the firm who are not officers or directors of the relevant portfolio company or its subsidiaries, or even junior deal team professionals who facilitate the day-to-day progress of a transaction. Depending on how the agencies construe "supervisory deal team leads" in practice, for small to mid-size private equity firms the term could encompass nearly all the firm's investment professionals and deal originations staff, vastly expanding the universe of documents that such firms would be required to submit with HSR notifications. In addition to the increased burden, this requirement would often greatly increase the challenges with ensuring consistency, accuracy, and precision in deal documents.
- **Ordinary Course Strategic Documents:** With the proposed new form, notifying parties would need to submit certain high-level strategic documents (e.g., periodic business or strategic plans), not just documents created in connection with the notified transaction. The proposed changes would capture ordinary course documents that contain information regarding market shares, competition, competitors, or markets regarding products or services where the merging parties overlap. Insofar as not captured by disclosures regarding the strategic rationale for a transaction, this requirement might also be read to require disclosure of materials that a sponsor and its consultants developed to evaluate the merits of investments in various markets and industries, even before an initial platform company investment decision is formulated and pursued. This requirement would require companies to be even more vigilant in establishing procedures to minimize antitrust risk

from misleading, inaccurate, or imprecise strategic plans and similar documents. Private equity firms may face particular challenges given their typically diffuse range of portfolio companies that could be parties to transactions that might receive antitrust scrutiny.

Other Significant Proposed Changes

- **Prior Acquisitions:** Consistent with the agencies' focus on possible anticompetitive effects from the buy-and-build model, the proposed new HSR form would substantially expand notifying parties' obligation to disclose prior acquisitions. The proposed rules would (i) eliminate the current $10 million annual net sales or total assets threshold for disclosures of prior acquisitions, so all acquisitions in overlapping NAICS codes or described in the horizontal overlaps narrative would need to be disclosed; (ii) expand the timeframe for reporting prior acquisitions from five to ten years (encompassing the typical hold period for most private equity platforms); and (iii) extend the reporting obligation to the acquired, not just the acquiring, party. These expanded disclosure obligations would give the authorities more opportunities to scrutinize transactions that are part of a series of transactions, especially those that include small, non-HSR reportable transactions. They could even lead to scrutiny of *deals that have already closed*, given the agencies' focus on potential challenges to consummated transactions, especially in the private equity context. The proposing release emphasizes that the proposed expanded requirement for disclosing prior acquisitions "can be especially important . . . where acquisitions are typically not HSR-reportable but nonetheless can cause competitive harm and alter the market dynamics for the reported transaction." This new requirement will make it even more important for private equity firms, in consultation with counsel, to evaluate acquisition and platform company investment strategies with an eye toward minimizing antitrust risk for contemplated or potential future acquisitions. This should include careful consideration of the antitrust implications for alternative sequencing of serial transactions in a sector and maintaining accurate and precise documentation even for non-reportable transactions (in part, because those documents could come to light in connection with a future reportable transaction).
- **Minority Stakes:** The current HSR form requires disclosure of holders of 5% or more, but less than 50%, of the acquiring ultimate parent entity and acquiring entity and of the acquired entity and does not require identification of limited partners (even if they hold 5% or more). The proposed new form would require the acquiring party to disclose all entities or individuals, including limited partners, that hold 5% of the voting securities or non-corporate interests of the (i) acquiring entity, (ii) any entity directly or indirectly controlled by the acquiring entity, (iii) any entity that directly or indirectly controls the acquiring entity, and (iv) any entity within the acquiring person that has been or will be created in contemplation of, or for the purpose of effectuating, the transaction. Especially in the private equity context, this could greatly increase disclosure obligations regarding minority investments. As with many of the other changes, these new requirements are directed at

obtaining information bearing on potential issues that have been a particular focus of agency scrutiny – whether overlapping minority stakes in competing businesses can harm competition, e.g., by altering incentives to compete aggressively or reducing the robustness of competition through transfers of competitively sensitive information among rivals. Given the uncertain and potentially limitless implications of the "direct or indirect" "control or controlled by" tests in elements (ii) and (iii) above, the proposed new HSR form could create burdensome disclosure obligations that will prove challenging to disclose and perhaps even more difficult for regulators to evaluate. Funds will need to consider potential issues that this enhanced disclosure requirement might flag for the authorities and how to respond quickly and effectively to any resulting inquiry.

– **Other Types of Interest Holders that May Exert Influence:** The proposed rules would now require disclosure of a vaguely-defined group of entities or individuals "that may have a material influence on the management or operations of the acquiring person" beyond minority equity holders. This would include individuals or entities that, for the acquiring entity (and potentially affiliates) (i) provide credit, (ii) hold non-voting securities, options, or warrants, (iii) are board members or board observers or have nominating rights for board members or observers, or (iv) have agreements to manage entities associated with the transaction (e.g., unrelated third parties that manage their operations). Credit relationships would become disclosable when creditors provide credit totaling 10% or more of the value of the acquiring entity; and holders of non-voting securities, options, or warrants would need to be disclosed if their equity represents 10% of the acquiring person's equity (including on an as-converted basis). These requirements seem aimed at giving the agencies information to assess theories that certain types of relationships might give people or entities influence over two or more competing firms in the same sector that could result in competitive harm. Given the especially complex range of relationships that sometimes surround private capital generally, and private equity and their platform companies specifically, investors, lenders, and companies across the private capital markets will need to pay careful attention to whether any disclosed individuals or entities could flag issues for the investigating agency and be prepared quickly to address any resulting questions.

– **Interlocking Directors, Officers, and Observers:** Current antitrust agency leadership has strongly emphasized enforcement of Section 8 of the Clayton Act, which (with *de minimis* exemption) absolutely prohibits officer or director interlocks between competing firms.[10] The DOJ has brought several recent enforcement actions to dissolve such overlaps. Consistent with this agency focus, the proposed new HSR form would require, for the first time, notifying parties to disclose their officers, directors, board observers (and

[10] See Jonathan Kanter, Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022) ("[W]e are committed to litigating cases using the whole legislative toolbox that Congress has given us to promote competition. One tool that I think we can use more is Section 8 of the Clayton Act. … We are ramping up efforts to identify violations across the broader economy and we will not hesitate to bring Section 8 cases to break up interlocking directorates."), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

people with similar functions for non-corporate entities) and identify other entities for which those individuals have had such roles during the previous two years.

This focus on Section 8 enforcement brings particular risk for private equity firms, which often have investments in two or more competing companies and wish to have board representation for each of them. Although many larger private equity funds have been closely monitoring the DOJ's Section 8 enforcement posture and have taken steps to address possible compliance risks, middle and lower middle market funds may have less effective compliance mechanisms, partly because they may lack sufficient internal or external advisor resources. The agencies clearly intend this disclosure requirement to provide information that may lead to Section 8 enforcement actions, and notifying parties are well-advised to assess (and potentially remedy in advance) any problematic director or officer overlaps that they would be required to disclose.

Some Key Bigger Picture Implications: We Are Here to Help!

Assuming the final new HSR form is close to the proposed one – which is probable – notifying parties of all types will face new sources of antitrust risks and burdens, but private equity is especially likely to be substantially affected. Acquisitions – including serial acquisitions in specific sectors – are a major focus for many private equity firms and platform companies. Additionally, as discussed, their often complex and far-flung investment holdings (both current and prior) will make establishing and maintaining effective measures to address the new HSR form particularly challenging. The good news is that these challenges are not insurmountable: the risks and burdens can be significantly mitigated if firms take well-considered actions in contemplation of the new form.

Private equity firms and platform companies are well advised to consider the following actions, among others. Now is the ideal time to start doing so, given that effective action may take months and many firms are probably now evaluating potential transactions that would not be notified under HSR until the new form becomes effective:

- **Plan for the new HSR notification process:** Practically speaking, the new form will involve much more burden and cost, even for non-controversial deals. The FTC estimates that businesses will need on average 144 hours to prepare notifications with the proposed new form, four times the current average and seven times more for complex transactions. That is an under-estimate, especially for private equity firms given their typically complex business forms and multiplicity of affiliates. Inevitably, this will lead to longer lead times needed to prepare and complete the pre-merger notifications and is likely to extend transaction timelines and increase costs. Firms should start implementing an effective mechanism for gathering in one place and updating lists of prior acquisitions, minority stakeholders, other types of influence holders that may have influence within the agencies' proposed definition, and board memberships of individuals affiliated with the firm. Doing so should substantially expedite providing this (potentially copious) information for notified transactions and help manage transaction costs after the new form becomes effective.

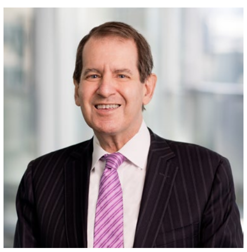
– **Carefully develop positions on market definition:** Given that positions regarding market definition for the newly required HSR narrative will be crucial, both for current and future transactions, firms should begin working with antitrust counsel to develop defensible positions that do not inadvertently create antitrust risk for future transactions. This will often be a legally and factually complex exercise. Although positions on market definition will need to be tailored for particular notified transactions, by working on these issues now firms can save HSR form preparation time later and reduce the risks of making mistakes under time pressure to get the notification on file.

– **Revise document creation protocols:** As discussed, the proposed new HSR form would create new sources of antitrust risk from documents. For instance, draft Item 4(c)/4(d) documents will now be producible and will no longer be limited to documents prepared by or for an officer or director, but also by or for "a supervisory deal team lead." Ordinary course strategic documents, like business plans, that are not created in connection with the transaction under review, will need to be produced with the HSR notification, not just at an agency's request. Private equity firms and their platform companies will need to be even more diligent to avoid creating vague, incomplete, or otherwise misleading documents that could lead to an extended investigation. Firms need robust training and monitoring programs for both deal-related and high-level ordinary course document creation, and this will often be especially challenging for private equity firms with complex and diffuse holdings.

– **Prepare for agency focus on theories that were traditionally rarely employed:** Several of the proposed HSR form changes reflect a new antitrust enforcers' focus on theories of competitive harm that they have historically rarely pursued. These include concerns about companies or individuals having minority interests or other sources of possible influence over two or more firms that compete and possible competitive harm from a firm's serial acquisitions in a particular industry. Given both the authorities' current focus on private equity transactions generally and their belief that private equity firms or their platform companies have many significant minority investors or other relationships that an authority might conclude convey influence, investigations grounded in these sorts of unconventional theories are likely to be especially frequent for private equity investors and their portfolio companies. It will be important to think creatively about how these issues could manifest for a particular transaction and plan ahead to quickly and effectively resolve agency inquiries grounded in theories of these types if they should occur. Moreover, there may be measures that firms can take now to create a record showing that minority shareholders or other types of interest holders are not unduly influencing platform companies' competitive behavior, and that serial transactions in an industry have not led to anticompetitive effects.

With these and other issues in mind, WilmerHale has created an interdisciplinary working group including lawyers with antitrust (federal and state), private equity, and general corporate expertise to help our clients efficiently, effectively, and quickly address the challenges the proposed new HSR form would create. We intend to provide our perspectives as the proposal moves forward and is implemented, including through additional client memoranda and webinars. Although private equity funds are an enforcement focus of the FTC, the DOJ, and many state attorneys general, these proposed rules have significant ramifications beyond the private equity ecosystem. We look forward to working with current and new clients – private equity and other investors and companies that will be transacting under the new form – to help minimize the antitrust enforcement risks, burdens, delays, and expenses that the proposed new form would create.

New HSR Form Working Group



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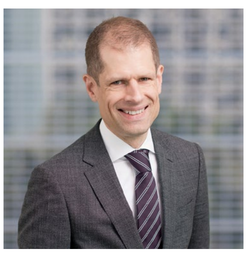

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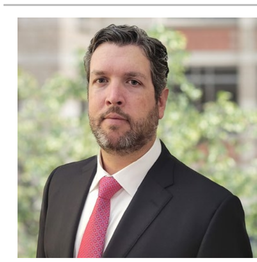

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