CADWALADER

Cadwalader, Wickersham & Taft LLP
www.cadwalader.com

Clients&FriendsMemo

Private Equity Purchasers and SPACs May Be "Preferred" Divestiture Buyers under New DOJ Guidelines for Merger Remedies

September 8, 2020

What happened?

On September 3, 2020, the Department of Justice ("DOJ") issued a revised Merger Remedies Manual, which sets forth the Division's framework for implementing remedies to resolve antitrust concerns in merger cases. The Manual specifically calls out Private Equity firms as potentially preferred buyers in certain situations. We believe the policy behind that announcement applies equally to Special Purpose Acquisition Companies ("SPACs"). For a general description of the revised rules, please see our memo, Justice Department Revises Merger Remedies Guidelines.

Why does this matter?

When DOJ or the Federal Trade Commission ("FTC") identifies antitrust concerns with proposed transactions, they usually will seek the divestiture of a standalone business. In evaluating a proposed remedy, the Merger Remedies Manual states that the Division "will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms." Significantly, the new Manual now explicitly recognizes that "in some cases a private equity purchaser may be preferred." Citing the FTC's 2017 Merger Remedies Report, DOJ noted that "in some cases funding from private equity and other investment firms was important to the success of the remedy because the purchaser had flexibility in investment strategy, was committed to the divestiture, and was willing to invest more when necessary." This conclusion would equally support SPACs as divestiture buyer candidates. DOJ noted further that the FTC's study also identified cases of failed divestitures where the divestiture buyer's lack of flexibility in financing "contributed significantly." Aside from investment commitment and flexibility, private-equity-backed purchasers and SPACs are even more attractive as divestiture buyers where the acquirer's existing portfolio companies pose no competitive concerns.

The Merger Remedies Manual sets forth three fundamental tests for the approval of a proposed purchaser:

1. Divestiture of the assets to the proposed purchaser must not itself cause competitive harm.
2. The Division "must be certain" that the purchaser has the incentive to use the divestiture assets to compete in the market.
3. The Division will evaluate the "fitness" of the proposed purchaser to ensure that the purchaser "has sufficient acumen, experience, and financial capability to compete effectively in the market over the long term."

Private equity firms and SPACs seeking to purchase businesses should be prepared to show that they will be viable and strong competitors in terms of financial resources, management expertise, strategic vision, and incentive to compete and grow the target businesses over the long term.

How can Cadwalader help?

Cadwalader's antitrust team, located in key jurisdictions in the United States (New York, Washington, D.C., Charlotte) and London, is composed of specialists who offer "end-to-end" advice on compliance, investigations and related litigation. Our practitioners are experienced in counseling on the Hart-Scott-Rodino Act and merger issues and are available to assist private equity and SPAC clients with regulatory issues related to their acquisition efforts.

* * *

If you have any questions, please feel free to contact either of the following Cadwalader attorneys.

Joel Mitnick	+1 212 504-6555	joel.mitnick@cwt.com
Ngoc Hulbig	+1 704 348-5282	ngoc.hulbig@cwt.com