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Navigating BEA and Clayton Act Section 8 Compliance and Enforcement Actions for Private Equity Firms and Fund Managers

April 6, 2023

Private equity firms and fund managers continue to see an increase in regulatory action from the federal government. On the heels of the rapidly approaching deadline for BE-12 filing and the DOJ's increased use of Section 8 of the Clayton Act which targets cross-ownership of potentially competing portfolio companies, Proskauer's antitrust group discusses how to manage compliance and avoid potential investigations and enforcement actions.

I. Foreign Direct Investment in the United States: Due Date Approaching for BE-12 Filing

Every five years, the Bureau of Economic Analysis (the "BEA") of the U.S. Department of Commerce conducts the BE-12 benchmark survey to gather information about foreign direct investment in the United States. The survey "covers the universe of foreign direct investment in the United States in terms of value and is BEA's most detailed survey of such investment." This year, entities subject to reporting requirements must file the BE-12 survey (rather than the annual BE-15 survey) and must do so ***regardless of whether they are contacted by the BEA***. Paper submissions are due on May 31, 2023. E-filing submissions are due on June 30, 2023.

Who Must File

Every U.S. affiliate, defined as a "U.S. business enterprise in which a foreign person (foreign parent) owned or controlled, directly or indirectly, 10 percent or more of the voting securities in an incorporated U.S. business enterprise, or an equivalent interest in an unincorporated U.S. business enterprise, at the end of the business enterprise's fiscal year that ended in the calendar year covered by the survey," must complete the survey. Entities must file one of four forms: BE-12A, BE-12B, BE-12C, or BE-12 Claim for Not Filing.

- **BE-12A.** Completed by a U.S. affiliate that is **majority-owned** by one or more foreign parents and whose total assets, sales, or net income is greater than $300 million.
- **BE-12B.** Completed by a U.S. affiliate that meets one of two criteria: (i) it is majority-owned by one or more foreign parents and has total assets, sales, or net income of more than $60 million and less than $300 million, or (ii) it is **minority-owned** by foreign parents and has total assets, sales, or net income of more than $60 million.
- **BE-12C.** This form must be completed by a **majority or minority-owned**S. affiliate that has total assets, sales, or net income of $60 million or less.
- **BE-12 Claim for Not Filing.** This form should be used by any entity that is not required to file any of the preceding three forms but was nonetheless notified by the BEA to file.

Who Does Not Need to File

Only the U.S. affiliate at the first level of ownership must file. Entities further down the chain of ownership need not file, and may refer a BEA request to the first level affiliate. In addition, certain private funds are not required to file. Specifically, a private fund need not file if it does not own an operating company—defined as a company that is not a private fund or a holding company—in which the foreign parent owns at least 10 percent of the voting interest.

II. Clayton Act Section 8 Update – Increased Scrutiny of PE Firms

In October 2022, we alerted readers to the DOJ's increased focus on enforcing Section 8 of the Clayton Act, which, with certain exceptions, prohibits director overlaps between competitors. The DOJ at that time began issuing letters to certain investment firms that own stakes in competing "portfolio companies" and has opened investigations into potential Section 8 violations arising out of such cross-ownership.

More recently, the DOJ has announced several "potentially illegal interlocking directorates" that signal the agency's enforcement commitment in this area and expanded reading of the statute's reach.

One investment firm was targeted in an alleged interlock where its "representatives" sat on the boards of three competing software companies. Though the same individual served on two of the boards, on one of them, the individual was joined by two additional firm designees. And a separate, non-overlapping group of designees served on the third board. Consistent with Assistant Attorney General Jonathan Kanter's announced intention to expand Section 8 enforcement, all such board designees associated with the investment firm resigned their positions.

In a second case, the agency targeted a potential interlock between two insurance companies — one wholly-owned by a large private equity firm's subsidiary, and another whose board the private equity firm held a contractual right to appoint a director to. The firm initially announced it would exercise its contractual directorship right but later reversed after the DOJ raised concerns.

In a third matter, the DOJ flagged a potential interlock between two companies that provide crew, maintenance, and insurance for domestic air freight routes. An *investment group* led by a private equity firm proposed acquiring all outstanding shares of one company, while at the time, two individuals "affiliated" with the same private equity firm sat on the board of a competing company. The two "affiliated individuals" resigned from their directorships. Though the agency did not provide clarity as to the precise relationship between the private equity firm and the individuals who resigned, it appears they had been appointed by the firm.

The enforcement actions are consistent with a "deputization theory" of Section 8 whereby an *entity* can be deemed a "director" under the statute, acting through a natural person representative. While the DOJ has advanced this theory in enforcement actions previously, the question has not yet been squarely resolved by the Supreme Court, and there is not a clear majority view among the federal courts of appeal. In *Reading Int'l v. Oaktree Capital Mgmt.*, the court accepted the theory in part because "[t]o hold otherwise would be to allow corporations (and individuals) to evade antitrust liability simply by designating agents to serve their bidding on the boards of competing businesses." In another case, *Pocahontas Supreme Coal Co. v. Bethlehem Steel*, the Fourth Circuit Court of Appeals acknowledged the theory, but without rejecting it as a matter of law, found it was not supported by the facts in that case.

Thus, it remains to be seen whether courts ultimately will accept the agency's position that separate individuals associated with the same firm can represent a prohibited interlock under Section 8.

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