April 21, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Jonathan Kanter
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Request for Information on Merger Enforcement

Dear Assistant Attorney General Kanter and Chair Khan:

The American Investment Council (the "AIC" or "we," as applicable) is submitting this letter in response to the January 18, 2022 Request for Information on Merger Enforcement (the "RFI") issued by the Federal Trade Commission (the "FTC") and the U.S. Department of Justice Antitrust Division (the "DOJ," and together with FTC, the "Agencies").

The AIC is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by promoting responsible long-term investments. In this effort, the AIC develops, analyzes, and distributes information about the private equity, growth capital, and private credit industries and their contributions to the U.S. and global economy. Established in 2007, and formerly known as the Private Equity Growth Capital Council, the AIC is based in Washington, D.C. The AIC's members are the world's leading private equity, growth capital, and private credit firms, united by their commitment to growing and strengthening the businesses in which they invest. For further information about the AIC and our members, please visit our website at http://www.investmentcouncil.org.

The AIC appreciates the Agencies' interest in revising the federal merger guidelines and agrees that the guidelines should evolve to reflect both market developments and current economic learning about competition. While the RFI's questions address a broad range of topics relevant to the analysis of M&A transactions generally, two of the Agencies' questions appear to be directed to private equity in particular:

- Is the guidelines' approach to private equity acquisitions adequate? If not, what changes should be made?[1]

- Do the guidelines reflect any additional competitive concerns reflected in the statute's prohibition against mergers that "may … tend to create a monopoly"? Is this statutory language directed at preventing monopolies in their incipiency such as through serial acquisitions, including rollups? How should the guidelines address a merger that may tend to create a monopoly? How should the guidelines analyze whether there is a "trend toward concentration in the industry," and what impact should such a trend have on the analysis of an individual transaction?[2]

I. Private Equity Transactions Do Not Systemically Harm Competition or Violate Current Antitrust Doctrine

In response to the first inquiry, the AIC and its constituent members believe strongly that the current guidelines' approach to private equity acquisitions is appropriate. There is neither a legal basis under federal antitrust law nor empirical evidence of harm stemming from the private equity buyout model that would justify singling out private equity transactions for special treatment. The AIC and its constituent members have extensive experience working with the current guidelines, which already account for any competitive concerns that may be raised by private equity acquisitions. Private equity acquisitions are not, in any categorical or fundamental respect, different or more concerning than acquisitions by other buyer categories. In the ordinary course, acquisitions by financial sponsors are more likely to be procompetitive than those made by strategic buyers. If any changes are made to the guidelines, they should recognize that private equity sponsors can play a beneficial role in promoting competition that ultimately benefits consumers.

Private equity funds invest capital contributed by large institutional investors and the private equity fund sponsors in companies that are perceived to have growth potential. Sponsors then work with these companies to grow, expand or turnaround their businesses, thus making them more competitive. In general, private equity buyers are more likely to be investing behind a challenger seeking to grow than an already large player seeking to preserve its market position. Private equity investments strengthen the economy and competition, and ultimately benefit a broad spectrum of stakeholders,

[1] *See* DOJ and FTC *Request for Information on Merger Enforcement* 12(i) (January 18, 2022).
[2] *Id.* at 1(d)

including workers and consumers, by providing vital capital and expertise for growing businesses.

Private equity has a large beneficial impact on the economy; in 2020, private equity-backed companies employed over 11.7 million American workers, generated over $1.4 trillion in gross domestic product and paid over $218 billion in taxes.[3] And because they typically target firms that either underperform relative to their market potential, are poised for significant growth or expansion after the infusion of new capital and management expertise, private equity investments increase competition.

The limited partners that invest in private equity funds consist of many of the nation's largest pension and retirement funds, charitable foundations and university endowments. Targeting private equity deal-making would ultimately depress returns for these funds and jeopardize the retirement security of millions of private and public sector workers. The AIC's studies have found that over 34 million public sector workers and retirees had some exposure to private equity,[4] and that private equity is the best returning asset class in a public pension portfolio, out-performing all other asset classes by delivering a median annualized return of 18.42 percent over a 10-year period ending in September 2020.[5]

Private equity sponsors welcome appropriate regulatory scrutiny when it is warranted under existing antitrust law, but private equity transactions should be evaluated according to the same criteria and in the same fashion as all other mergers. The Clayton Act does not distinguish among the forms of capital involved in a transaction, nor should it. Private equity transactions have consistently been subject to the same rules as public company transactions. There have been no legal developments that authorize the creation of a "Special Characteristics Market" for private equity transactions, nor have there been industry developments that are categorically more problematic from a competition perspective than transactions involving other capital sources. Antitrust law is clear that transactions should be evaluated on a case-by-case basis. There is no statutory basis for treating an entire category of transactions with greater suspicion or scrutiny based solely on the buyer's source of capital. There have been many private equity transactions in recent years, yet rarely have those transactions been alleged to violate (let alone found to violate) the Clayton Act. The vast majority of challenged transactions are between large public companies. Absent a solid evidentiary basis for concluding that there are special competition-related problems with private equity transactions, and given that the opposite is demonstrably true, changing the guidelines to disfavor private equity buyers or sellers, or subjecting them to differential scrutiny, would be arbitrary and unjustified.

There is no evidence, empirical or otherwise, to suggest that private equity transactions present "special characteristics" that require a new or different approach to

---

[3] *See Economic Contribution of the US Private Equity Sector in 2020, Prepared for the American Investment Council* at ii (EY, May 13, 2021).
[4] American Investment Council 2021 Public Pension Study at 2.
[5] *Private Equity Index and Selected Benchmark Statistics* at 23 (Cambridge Associates, Sep. 30, 2021).

merger control. Private equity transactions do not create heightened risk to competition or consumer welfare per se and therefore do not categorically raise concerns under long-standing antitrust doctrine.

The DOJ itself has instructed that when divestitures are required to preserve competition, private equity backed purchasers are sometimes preferred because private equity firms make investments in capital and operational expertise that increases the likelihood the divested asset will survive.[6] Similarly, when studying merger remedies, the FTC found that private-equity funding "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."[7]

Any transaction that raises concerns under recognized antitrust law principles can already be fully reviewed and addressed under the existing guidelines and approach. The empirical evidence demonstrates that private equity firms generate wealth through organic economic growth, not by limiting competition. By injecting new capital and bringing management and operational expertise into stagnant businesses, private equity firms foster competition against more established firms and boost economic output.[8] Academic studies have shown that firms with private equity backing increased sales by 50% relative to non-private equity-backed firms, and that this growth was driven by the launch of new products and geographic expansion,[9] not by price increases.[10] Furthermore, private equity buyouts lead to a dramatic increase in firm output and the introduction of novel products.[11] In fact, instead of harming competition, private equity investment has actually been shown to generate externalities that boost employment, profitability, and capital expenditures for publicly listed companies competing in the same industry.[12] Such outcomes should be applauded by competition law, not subjected to increased scrutiny.

---

[6] *See* U.S. DOJ Antitrust Division, *Mergers Remedies Manual* (September 2020) at 24-25.

[7] *Id.*

[8] John Paglia and Maretno A. Harjoto, *The Effects of Private Equity and Venture Capital on Sales and Employment Growth in Small and Medium Sized Businesses*, JOURNAL OF BANKING AND FINANCE, Vol. 47 at 177 (2014) ("PE and VC financing have positive impacts on single entity business establishments' net sales and employment growth.").

[9] *Id*. ("Compared to matched firms, target firms launch more products, expand more geographically, and enter more retail chains. Target firms become more acquisitive following buyouts, but organic growth is also strong.").

[10] *See* Cesare Fracassi et al., *Barbarians at the Store? Private Equity, Products, and Consumers* J. OF FINANCE (Forthcoming) at 2, 35 ("We begin by documenting that in the five years post-buyout private equity targets increase revenues by 50% on average compared to matched control firms. Price increases do not drive this growth.").

[11] *Id.* at 15-19 ("We find that revenues relative to a matched firm increase dramatically…This growth is primarily driven by a 43% increase in units sold.") ("It appears that PE targets both create new varieties in existing product categories and enter into new ones.").

[12] Serdar Aldatmaz and Gregory W. Brown, *Private Equity in the Global Economy: Evidence on Industry Spillovers* 31(UNC Kenan-Flagler Research Paper No. Jul. 29, 2019) ("In our analysis of the real economic impact of PE investments, we find that employment growth, profitability growth, and labor productivity

Given their size, private equity investments are also more likely to benefit less-established market participants rather than dominant incumbents. In many industries, the dominant companies have market capitalizations in excess of $10 billion; since the financial crisis, the median U.S. LBO transaction size has never surpassed $2 billion.[13] The majority of private equity deal volume is concentrated among middle market companies – over 60% of private equity deals are less than $100 million in size – meaning private equity invests in companies that tend to be growing challengers, not dominant incumbents.[14] This investment model benefits consumers, workers, and upstream and downstream businesses.

II. Serial Acquisitions Can Be Procompetitive and Do Not Tend to Create Monopolies

In response to the RFI's second inquiry relevant to private equity, the AIC believes that private equity "rollups" do not tend to create monopolies. All acquisitions, including serial acquisitions, should be addressed based on the transaction's individual circumstances. Add-on acquisitions by private equity firms typically bring increased competition and productivity to stagnant markets by injecting access to capital and managerial expertise. It is generally procompetitive to combine similar businesses in order to obtain economies of scale and increase efficiency, at least where doing so strengthens a weak competitor rather than creating a dominant one. The existing guidelines provide for precisely that sort of analysis. There is simply no justification for any new or different approach that would cast a jaundiced eye on any transaction merely because it is a follow-on, by a private equity firm or otherwise.

Combining multiple small, often family-owned, businesses in a fragmented market should not raise antitrust alarm. Absent evidence that private equity "rollups" substantially lessen competition or tend to create a monopoly, they are not implicated by the statutory language of Section 7 of the Clayton Act.[15] To the contrary, such transactions often result in pro-competitive synergies.[16] And serial acquisitions typically involve serial HSR filings, giving the Agencies ample opportunity to assess whether any particular transaction, or any series of transactions, may substantially lessen competition. The FTC and DOJ have the authority to investigate, and ultimately challenge any transaction, including those that fall below the HSR thresholds.

---

growth all increase across the public companies in an industry following PE investments. Additionally, we find that industry-level capital expenditures grow faster as well.").

[13] S&P Global Market Intelligence, *Leveraged loans fuel Q2 LBOs at fastest pace since global financial crisis* (July 20, 2021).

[14] US PE Breakdown at 16 (PitchBook 2021).

[15] *See* DOJ and FTC *Request for Information on Merger Enforcement* issued January 18, 2022, 1(d) ("Do the guidelines reflect any additional competitive concerns reflected in the statute's prohibition against mergers that 'may…tend to crate a monopoly'?").

[16] Dyaran Bansraj et al., *Can Private Equity Funds Act as Strategic Buyers? Evidence from Buy-and-Build Strategies* at 41 (Tinbergen Institute, Discussion Paper Aug. 5, 2020) (finding that "buy-and-build" acquisition strategies lead to synergistic operational improvements over time).

Finally, contrary to the Agencies' suggestion, private equity transactions do not create monopsony power in labor markets or otherwise give portfolio companies unfair purchasing power. Academic studies show that in private equity buyouts of privately-owned firms – the most common form of private equity transaction – job growth actually increases 12.8 percentage points post-buyout relative to peer firms.[17] To date, the Agencies have provided no evidence to support a monopsony hypothesis in relation to labor, and any such concerns the Agencies may have should be addressed on a case-by-case basis.

III. Antitrust Law Is an Inappropriate Vehicle for Regulating the Private Equity Industry to Address Concerns Separate from Competition

We are aware that some have advocated for expanding the use of "antitrust" as a broad tool to solve any number or socio-economic issues. To the extent the Agencies harbor concerns about the private equity business model unrelated to competition, the industry is already subject to significant regulatory oversight and antitrust law is a wholly inappropriate vehicle for regulating the private equity industry. The Securities and Exchange Commission (the "SEC") is the primary regulator of private equity. The securities laws, including the Investment Advisers Act of 1940, provide an extensive regulatory framework for those participants. The SEC routinely exercises its power to conduct oversight and regulate certain activities in the private equity space. The antitrust laws do not empower the FTC and DOJ to use the merger review process to regulate private equity firms' business strategies unless the antitrust laws are implicated. Medical billing and labor issues, for example, are closely regulated by other agencies with direct expertise and authority in those subject areas.[18] The Department of Health and Human Services and the Department of Labor have historically factored competition concerns into their regulatory activities,[19] and both the DOJ and FTC have a long history of working closely with other agencies that have industry-specific mandates to ensure competition concerns are taken into account.

Similarly, while the Agencies have begun to express interest in private equity portfolio companies' post-merger liquidity, an acquired company's leverage ratio does not provide a basis for antitrust scrutiny. Private equity sponsors have no incentive to hamper their portfolio investments' competitive viability through excessive leverage. And recent studies have found that private equity-owned firms are neither systemically

---

[17] *See* Davis, Steven J. et al., *The Economic Effects of Private Equity Buyouts* 19 (July 12, 2021). Available at SSRN: https://ssrn.com/abstract=3465723.
[18] *See* Statement of Commissioner Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress, Commission File No. P110014, July 8, 2020.
[19] *See e.g.*, U.S. Department of Health and Human Services, U.S. Department of the Treasury and U.S. Department of Labor, Reforming America's Healthcare System Through Choice and Competition, (December 3, 2018).

over leveraged, nor do they contribute disproportionately to corporate distress and financial fragility.[20]

In conclusion, the AIC reiterates that existing antitrust legal frameworks have and continue to serve consumers' best interests.[21] Political antipathy to the private equity industry is not a sound or defensible basis for altering well-established, neutral merger guidelines in order to create a systematic bias against one category of transaction participants. The Agencies are already empowered to review and challenge those mergers and acquisitions that raise competitive concerns, while still allowing free and open markets to serve as the engine for economic growth and efficient capital allocation. When and where the government needs to and does intervene, the Agencies already have demonstrated that they have the power to achieve the results necessary to keep the market both free and fair.

*****

The AIC appreciates the opportunity to submit this letter in response to the RFI, and we would be pleased to answer any questions you might have regarding our comments, or regarding the private equity, growth capital, and private credit industry more generally.

Thank you, in advance, for your consideration.

Respectfully submitted,

Jason Mulvihill

Jason Mulvihill
Chief Operating Officer and General Counsel
American Investment Council

cc The Honorable Noah Joshua Phillips
Commissioner, Federal Trade Commission
The Honorable Rebecca Kelly Slaughter
Commissioner, Federal Trade Commission
The Honorable Christine S. Wilson
Commissioner, Federal Trade Commission

[20] Sharjil M. Haque, *Does Private Equity Over-Lever Portfolio Companies*? 41 (UNC Working Paper Dec. 10, 2021).
[21] *See* October 5, 2021 Letter to Senate and House Judiciary Committees re merger policy.