



KIRKLAND & ELLIS LLP

Private Equity Newsletter

## FTC Action Suggests Greater Antitrust Scrutiny of Private Equity Deals as Well as New Solutions

### PENpoints

The FTC alleged that a minority interest in a private equity fund's portfolio company overlapped with another portfolio company.

There has been much discussion recently regarding (1) the Justice Department's antitrust investigation of private equity "club" deals (including the *Kirkland PEN* of October 13, 2006) and (2) the class action shareholder litigation subsequently asserted against 13 private equity firms. Perhaps more important than those antitrust developments, however, is the Federal Trade Commission's January 25, 2007 complaint and proposed consent decree in the *Kinder Morgan* going-private transaction, which may signal increased government attention to private equity deals, but also may open doors to creative new ways to resolve antitrust clearance issues.

The FTC's complaint challenges a \$22 billion deal in which management and a group of investment firms including funds sponsored by the Carlyle Group and Riverstone Holdings propose to acquire and take private the energy transportation, storage, and distribution firm *Kinder Morgan, Inc.*

According to the FTC, Carlyle and Riverstone would together hold a 22.6% interest in *Kinder Morgan* and be entitled to nominate 2 of its 11 board members. Carlyle and Riverstone together already hold a 50% interest in the general partner that controls *Magellan Midstream Partners, L.P.* and have veto rights over *Magellan* activities. The FTC asserts that *Magellan* is one of *Kinder Morgan's* principal competitors in petroleum terminaling services in the southeastern U.S., noting that, in some relevant markets, *Kinder*

*Morgan* and *Magellan* are the only two independent providers of petroleum terminaling services.

The FTC's *Kinder Morgan* action was unusual in at least two respects. *First*, the FTC has not often alleged that a minority interest in a private equity fund's portfolio company overlapped with another of the private equity firm's portfolio companies.

*Second*, to address competitive concerns, the FTC (and the Justice Department) typically require a party either to divest overlapping assets or businesses or to license overlapping intellectual property rights. In this case, the FTC did not order any divestiture to settle the *Kinder Morgan* complaint. Rather, the FTC, Carlyle and Riverstone agreed that Carlyle and Riverstone would (1) give up their representation on *Magellan's* boards of directors (thereby ceding control of *Magellan* to another private equity investor), (2) cease exerting control or influence over *Magellan* and (3) establish "firewalls" to safeguard against *Magellan* sharing non-public information with Carlyle or Riverstone, so that Carlyle's and Riverstone's investment in *Magellan* will be "passive."

The proposed *Kinder Morgan* consent decree may signal greater FTC and Justice Department interest in exploring competitive overlaps between a private equity firm's portfolio companies (even those in which it holds a minority interest). Accordingly, private equi-

ty firms should review actual and potential competitive overlaps between a target company and existing investments well in advance of a Hart-Scott-Rodino filing — even when existing or proposed investments represent minority interests or are held by different funds. If it is likely that the government will assert that a target business competes in a very concentrated market with one or more portfolio companies of funds sponsored by a private equity firm, that firm should work

closely with counsel early in the acquisition process to develop a specific HSR clearance strategy. Parties to such transactions — buyers and sellers — should also carefully consider antitrust protections in the acquisition agreement. While the proposed *Kinder Morgan* consent decree may raise concerns about government enforcement, this unique decree also suggests that the FTC and Justice Department may be open to creative remedies.

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If you have any questions about the matters addressed in this Kirkland PEN article, please contact the following Kirkland author or your regular Kirkland contact:

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## Federal Court Rejects Illinois' Restrictions on Investment in Sudan

A federal court in Chicago has declared unconstitutional an Illinois law preventing Illinois state retirement funds from investing in firms that do business with Sudan. The court ruled on February 23 that the law violated federal constitutional provisions that preclude states from interfering with the federal government's authority over foreign commerce and foreign affairs.

The law had prohibited Illinois pension funds and retirement systems from making investments in any company that owns or controls assets or transacts business in Sudan, including indirect investments in such companies through private equity and other

pooled investment vehicles. To comply with the law, Illinois funds required private equity funds to certify that their portfolios did not include any prohibited investments connected to Sudan.

It is not yet clear whether Illinois will appeal the court's decision (*National Foreign Trade Council et. al. v. Giannoulis, et. al.*, N.D. Ill., 06-CV-4251) or whether the Illinois legislature will attempt to revise the law. Also unclear is whether, prior to the issue being finally resolved, Illinois retirement funds will suspend their compliance with the Act or continue to proceed as they had under the law. We will continue to monitor this issue.

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## Summary of Recent Developments in Structuring Mergers, Acquisitions and Buyouts

Kirkland partner Jack Levin and Georgetown University law professor Martin Ginsburg have prepared a summary of major merger, acquisition and buyout developments in connection with the publication of the latest edition of their treatise, *Mergers, Acquisitions, and Buyouts* (Aspen Publishers). The summary of developments is available at:

[http://www.kirkland.com/ourfirm/docs/M\\_A\\_Letter.pdf](http://www.kirkland.com/ourfirm/docs/M_A_Letter.pdf)

## Supreme Court Sets High Bar for Predatory Bidding

In its recent *Weyerhaeuser* decision, the Supreme Court rejected the claim of a sawmill operator who argued that a large competitor had violated antitrust laws by paying above-market rates for raw materials and bidding up the prices of those materials for all purchasers. The Court set high hurdles for plaintiffs to clear in order to make successful predatory bidding claims. Kirkland's discussion and analysis of this decision is available at:

[http://www.kirkland.com/files/tbl\\_s14Publications/Document1303/1715/Weyerhaeuser\\_Antitrust\\_Decision.pdf](http://www.kirkland.com/files/tbl_s14Publications/Document1303/1715/Weyerhaeuser_Antitrust_Decision.pdf)

### **Kirkland's 14th Annual Technology and the Law Seminar**

**Chicago, IL; Los Angeles, CA; New York, NY; San Francisco, CA**

**May 11, 2007**

Kirkland's 14th Annual Technology and the Law Seminar will take place in the Firm's Chicago office and will be videoconferenced to our offices in Los Angeles, New York and San Francisco. The program is designed for lawyers and executives responsible for exploiting or protecting their company's intellectual property and technology assets and will explore current strategic legal issues relating to intellectual property and technology. For more information, contact Katherine Peters at +1 (312) 861-2934 or [kjpeters@kirkland.com](mailto:kjpeters@kirkland.com).

### **Kirkland Hong Kong Office Opening Reception**

**Hong Kong**

**May 16, 2007**

Kirkland will celebrate the recent opening of its Hong Kong office with a cocktail reception at Azure in Hotel LKF in Hong Kong. For more information, contact Elke Lo at +852-3761-3300 or [ello@kirkland.com](mailto:ello@kirkland.com).

### **IBA's Law and Business of Convergence in Asia**

**Shanghai, China**

**March 12-13, 2007**

As part of the International Bar Association meeting in Shanghai, Kirkland partner Christian Chadd Taylor will be a panelist at a conference entitled the "Law and Business of Convergence in Asia." Chadd will discuss "Getting and Keeping Your IP Rights in Rapidly Converging Technologies."

### **Illinois Venture Capital Association's "Transitioning Fund Management"**

**Chicago, IL**

**March 15, 2007**

Kirkland partner Bruce Ettelson will moderate a panel discussion entitled "Transitioning Fund Management." The panelists will describe what happens when a senior or founding partner retires and the changing roles they play in the firm's deal flow and fundraising.

### **Practising Law Institute's "Commercial Real Estate Financing 2007"**

**Chicago, IL**

**March 29-30, 2007**

Kirkland partner Bradley Ritter will discuss "Troubled Mortgage Loans and Workouts" at the Practising Law Institute's "Commercial Real Estate Financing 2007."

**27th Annual Ray Garrett Jr. Corporate  
and Securities Law Institute  
Chicago, IL  
May 3-4, 2007**

Kirkland partner Keith Crow will chair a session entitled "Selling to Private Equity" at the 27th Annual Ray Garrett Jr. Corporate and Securities Law Institute.

**Illinois Venture Capital  
Association/National Venture Capital  
Association Luncheon  
Chicago, IL  
May 9, 2007**

Kirkland partner Jack Levin will give the keynote address at a luncheon hosted by the Illinois Venture Capital Association and the National Venture Capital Association.

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## Kirkland & Ellis LLP's Private Equity Practice

Kirkland & Ellis LLP's private equity and venture capital attorneys handle leveraged buyouts, early-stage venture capital investments, later-stage growth capital transactions, recapitalizations and going-private transactions. We also have significant experience in the formation of private equity and venture capital funds. Kirkland represents more than 200 private equity firms from all industries in every major market around the world. Kirkland was named the 2006 "USA Law Firm of the Year" by Chambers & Partners for providing superior service in all practice areas.

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