

*Private  
Equity Fund  
Acquisition:  
FTC  
Clears with  
Conditions*

The Federal Trade Commission (“FTC”) recently granted antitrust clearance, with conditions, for the \$22 billion takeover of energy transportation and storage provider Kinder Morgan, Inc., (“KMI”) by a management-led investment group that includes private equity firms The Carlyle Group and Riverstone Holdings LLC. Approval of the deal and settlement of the formal FTC challenge requires Carlyle and Riverstone to convert interests in a rival company, Magellan Midstream, to a passive role. The FTC formally alleged that the transaction violated Section 7 of the Clayton Act and Section 5 of the FTC Act because investment funds controlled by Carlyle and Riverstone would hold interests in both KMI and Magellan Midstream, a competitor of KMI that also transports gas and other petroleum products.

**OVERVIEW**

As originally proposed, Carlyle and Riverstone gained the right to board representation at both KMI and Midstream, the right to exercise veto power over actions by Magellan, and access to non-public competitively sensitive information from or about KMI or Magellan. The FTC believed the terms of the proposed transaction would make it easier for the acquirers to exercise unilateral market power and increase the likelihood of coordinated interaction between the competitors in specific markets. The transaction would have combined the assets of a customer’s first and second choices in eleven markets.

Instead of forcing the divestiture of overlapping assets by the private equity funds, which is a common FTC practice, the terms of the consent order require KMI and Magellan to operate independently and in competition with one another. Carlyle and Riverstone will be prohibited from serving on any Magellan boards, and from exerting any control or influence over Magellan, as long as they hold any interest in KMI. In addition, Carlyle and Riverstone are required to establish procedures to prevent the exchange of competitively sensitive non-public information between KMI and Magellan. The consent order will terminate in ten years.

The approval and settlement may represent a new approach when considering investments by private equity firms, which are building conglomerates that rival the size of the largest publicly traded corporations. In an interview with Dow Jones Newswires, FTC Commissioner William E. Kovacic said, “the solution here is somewhat unusual, yet the significance of the purchasers’ status and the nature of the purchasers’ position in the marketplace dictated a somewhat different approach to addressing competitive concerns.” Commissioner Kovacic added that the nature of private equity investments, which tends to be of a more “hands-off nature” than other types of firms, lessened the threat to competition.

*continued*

#### REQUEST FOR COMMENTS

The Commission vote to approve the consent order and place a copy on the public record was 3-1, with Commissioner Jon Leibowitz voting no. Commissioner J. Thomas Rosch recused. The FTC will be accepting comments on the order for 30 days, until February 26, 2007, after which it will decide whether to make it final.

#### FOR MORE INFORMATION

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