

Hey Fintech, the Antitrust Division Is Watching You!

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What You Need To Know:

- The Antitrust Division is training its sights on fintech deals in which incumbents buy up “nascent competitors.”
- If you’re on the buy-side considering a “nascent competitor” transaction, early antitrust advice can help avoid the overstatements your bankers love and that antitrust enforcers target.
- “Nascent competitors” on the sell-side face the same issues, plus early antitrust advice will help you sort potential buyers by understanding their different risks and risk levels for closing a deal and to negotiate protections in the deal you decide to do.

Whether you are on the buy-side or the sell-side of a fintech deal, take note: The Department of Justice’s Antitrust Division is watching you. At least it is according to a recent speech by Deputy Assistant Attorney General Michael Murray entitled “The Muscular Role for Antitrust in Fintech, Financial Markets, and Banking: The Antitrust Division’s Decision to Lean In.” Murray explained that the Antitrust Division is “leaning in” to the fintech “space with a muscular role for antitrust.”

In particular, Murray notes seeing “a greater number of transactions involving acquisitions of nascent competitors in emerging technologies” and that the trend is “particularly prominent in the world of the fintech startup.” This trend is causing the Antitrust Division “to be vigilant to make sure that traditional business models are not using acquisitions to improperly frustrate innovation and harm consumers.”

And the risk of the antitrust regulators’ scrutiny does not go away just because a transaction

is not reportable under the Hart-Scott-Rodino (HSR) Act. (The current threshold for reporting deals under the HSR Act is \$94 million.)

What does all of this mean for you? It depends.

If you are on the buy-side and are considering a transaction involving a nascent competitor, engage antitrust counsel as early as possible in the process. All too often what you write or say about your deal—even at the earliest stages of working with bankers or drafting an LOI—can come back to haunt you. Antitrust counsel will help identify pitfalls before it is too late. That applies equally to non-reportable deals, as seen with Bazaarvoice’s acquisition of PowerReviews, a deal that was well under the filing threshold but which the Antitrust Division successfully challenged after the fact, relying extensively on internal Bazaarvoice communications, noting, among other things, that acquiring PowerReviews would “[e]liminat[e] [Bazaarvoice’s] primary competitor” and provide “relief from [] price erosion.”

What if instead you are a “nascent competitor” on the sell-side? The same advice holds true. Having antitrust counsel weigh in early in the process will help ensure that your pitch decks strike a balance of accurately reflecting your value and not using unnecessary puffery that could be viewed problematic from an antitrust perspective. Beyond potential risks in what you write, being able to identify early in the process potential issues with certain buyers can help you decide among potential suitors and to negotiate deal protections (for example, a reverse break-up fee) in the deal you decide to close.

The takeaway is to engage with antitrust counsel early in order to identify and manage risks. Whether it's our highly experienced team or another quality firm, earlier engagement is more effective, and in the long run is more cost effective as well.

To learn more about how we can help, reach out to any one of us.

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