Lowenstein Sandler

Hey Fintech: Watch What You Say, and Be Mindful of What Others Say on Your Behalf

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What You Need To Know:

- **No matter what industry you are in, what others say on your behalf can be ripe targets for antitrust enforcers.**
- **Consultants and bankers create "sales materials" with the same mindset as real estate agents describing a tiny house as "charming."**
- **The best way to head off these harmful and misleading documents is to have antitrust counsel involved as early as possible: best *before* they are written but at least *before* they are finalized.**

If you haven't seen our recent alert, "Hey Fintech, the Antitrust Division Is Watching You!," then you missed our coverage of the Antitrust Division's announcement that it intends to train its sights on fintech deals in which incumbents buy up "nascent competitors." We advised, among other things, that early antitrust advice can help you avoid the "overstatements" your bankers love and that antitrust enforcers target. Since that alert, there have been some interesting developments involving one deal in which such "overstatements" may ultimately play a role in the Antitrust Division analysis of that deal.

What's the deal? The Antitrust Division is investigating the proposed acquisition by Visa Inc. of Plaid Inc. In connection with that investigation, the Antitrust Division has asked Bain & Company Inc. to produce some documents. (The Antitrust Civil Process Act grants the Antitrust Division the authority to issue a Civil Investigative Demand – like a subpoena – to third parties as part of its pre-complaint powers to investigate possible violations of the antitrust laws.)

According to the heavily redacted Petition filed by the Antitrust Division in Massachusetts federal district court, Bain is withholding documents "relating to Visa's 'Project [redacted]' – a project on which Bain worked – focusing on the developing of new [redacted], including for Visa's [redacted] business."

The Antitrust Division says that Bain "has refused to produce the Project [redacted] documents," and is instead claiming "a seemingly blanket privilege over almost all Project [redacted]" at "Visa's direction." The Antitrust Division claims that Bain's invoking "unfounded privilege claims to withhold client's documents is a pattern among consulting firms, accounting firms, and investment banks." While we do not know what the Visa "Project [redacted]" documents actually say, and therefore cannot comment on whether Bain's privilege claims are well founded or not, the dispute over the documents highlights two important truisms in any antitrust investigation or litigation:

- Outright refusals to provide documents only heighten the regulator's interest in those

documents (you might as well be saying "these are the documents you really want to see and the ones we really don't want you to see").
- Documents written by consultants are likely to contain the type of "overstatements" that antitrust enforcers love, because consultants and bankers created those documents as sales materials with the same mindset that real estate agents have when they describe a tiny house as "charming."

What do we mean by "overstatements"? We mean statements that are not accurate and that overstate a party's competitive position or the expected success of a campaign or business initiative. It is always a bad idea to use inflammatory, unnecessarily aggressive, or "colorful" language that is imprecise and subject to different interpretations. It is best to avoid exaggerated power phrases such as "lock on the market," "high barriers to entry," and "competitive moat" to describe the buyer or the market, or words such as "dominant" to describe a party, or words and phrases like "destroy," "crush the competition," "dominate," "leverage," "stabilize," and "lock out" to describe the purpose or likely effect of a transaction or initiative. We could go on and on here, but there are too many examples to note, all of which we've seen in matters in which we've been involved.

When it comes to third parties working on behalf of your company or client (consultants and bankers, for example), it is important to have antitrust counsel involved as early as possible. What those third parties may write to help "sell" your business may be a red flag to the antitrust agencies, despite being inaccurate. And as we said in our earlier alert, the best way to head off these harmful and misleading documents is to intervene early and forcefully, preferably before any of them are drafted but at least before they are finalized.

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