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Don’t Nickle and Dime Compliance: Antitrust and Consumer Protection Risks in Finance

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Our latest episode, “Don’t Nickle and Dime Compliance: Antitrust and Consumer Protection Risks in Finance,” features Antitrust Practice Co-Chair Eva Cole and Partner Dana Cook-Milligan chat about enforcement and litigation risks in the financial services sectors. They explore best practices that firms should follow in the wake of volatility and uncertainty in the banking sector.

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Audio Transcript

Allie Kushner: Welcome to Winston's Women in Antitrust, a limited podcast series, tapping into the minds of a few of the women partners at Winston & Strawn practicing antitrust law. I'm your host, Alexandra Kushner, a senior associate in Winston's New York office. I represent companies across a variety of industries in complex commercial litigation and internal investigations, with a focus on financial services matters. In today's episode, we'll dive into what's new in the Financial Services sector with Eva Cole and Dana Cook-Milligan. I'll introduce our guests today.

Eva is a partner in the New York office of Winston & Strawn where she chairs the firm's Antitrust/Competition Practice Group. She focuses her practice on civil antitrust litigation, class actions, and international cartel investigations led by enforcement agencies around the world. Eva also regularly advises clients with respect to antitrust compliance, including by helping companies develop antitrust compliance policies and training to help prevent antitrust problems. Welcome, Eva.

Eva Cole: Thanks, Allie.

Allie Kushner: And Dana is a partner in Winston's San Francisco office. She focuses her practice on complex commercial litigation, antitrust, white collar criminal defense, and internal investigations. She has experience defending companies in price-fixing and conspiracy cases as well as in merger challenge cases. She also provides antitrust counseling to companies across a variety of industries. Welcome, Dana.

Dana Cook-Milligan: Thanks, Allie, happy to be here.

Allie Kushner: Thank you both for joining.

Recent events in the financial community, including the closing of significant banks and high-profile acquisitions, have created extensive challenges across the industry and beyond. The banking sector is experiencing a lot of volatility, and firms are thus facing a great deal of uncertainty.

Eva, against this backdrop, what do you think is the most important risk from an antitrust perspective that firms should keep in mind?

Eva Cole: Well for me, Allie, top of mind is that there is no crisis exception to cartel law. What we have seen in a lot of industries is when there is a particular industry crisis it drives competitors; it necessitates competitors, in fact, to talk to one another about what's going on, and there may be very legitimate reasons to do that, whether it's through a trade association or through some other approach.

However, you have to be really sure that your firm has clear policies outlining the permissible and impermissible scope of those communications, and that business personnel are really clear on those lines, because it is often in times of this uncertainty or destabilization that competitors end up going beyond the permissible scope. And just because there is a crisis in the industry at a particular moment doesn't mean that the antitrust laws are not going to be enforced, with just the same amount of robust enforcement that we see in other circumstances.

You just really need to be careful. We actually think it's really a good time to remind people about antitrust issues when there is a crisis going on in the industry so that folks can revisit and make sure they are clear on the guidelines.

Allie Kushner: Thanks, Eva. Yeah, that makes a lot of sense and is an important reminder for companies to keep in mind. Dana, do you have anything to add about the antitrust risks that firms face in these uncertain times?

Dana Cook-Milligan: So, one thing I would say firms need to keep in mind is what we call "document hygiene." That would be documents that you were creating now may be put in front of a regulator at a later time down the line, and that should be front of mind when creating documents in the present. There might be investigations into potential collusion, as Eva was saying, and we've seen actually increased scrutiny from the government following times of crisis.

So, document hygiene, and the sort of words that you use in a particular document when you are creating it, are really important. We are already seeing, for example, there are some high-profile acquisitions in the industry, and we expect to see additional consolidation in the banking sector in particular. Deal-related documents that you are creating now may end up in front of a regulator in the future.

So, what does that mean? That means you need to think about the language that you are using in the document as you create it. You should avoid hyperbole, make sure that you are documenting pro-competitive justifications for a potential combination, really making clear that you are making independent and pro-competitive decisions, and documenting that rather than using language that could be read against you in that way. Again, it's always a really good idea to consult with counsel at that time before creating documents about a deal that may eventually get produced to a regulator.

Eva Cole: Yeah, and on the issue of documents, let me just jump in here to caution financial services firms about communications that might be taking place off of firm devices.

We all know that financial services companies are, of course, subject to pretty strict requirements that their communications do occur on recorded devices, and there are some firm guidelines on those areas. But even without those requirements, it is best practice to have business-level communications—whether it's with customers, or clients, or others in the industry—to occur through firm email or on firm-issued phones.

This is an area that regulators are focused on particularly coming out of COVID when a lot of folks were working from home and using their personal devices more regularly. Regulators know to ask for, and it has really become a habit for them to ask for, personal device communications, whether it's text messages or otherwise. And it makes it a

lot easier from an e-discovery perspective if you don't have to go out and image a hundred or more phones of employees and personal devices of employees because they were using those for business communications.

Allie Kushner: That's all a great point, and I'm curious to know, what are you seeing further on this front, and what are some best practice approaches that firms should consider?

Eva Cole: Firms have really taken various approaches to address the issue. I think the very first thing is to make sure that you have a very clear policy, and a policy that makes sense in practice, for how your employees are doing business. And then, beyond actually having the policy, you want to make sure that you're communicating that policy really clearly to your employees, and that they understand what the repercussions are for not following the policies. Companies use a combination of a carrot and a stick approach. So, a lot of companies will provide bonuses to employees that are really compliant with policies. And then on the flip side, there can be consequences for employees that don't follow policies. I mean, I've seen cases where employees have had to be terminated because they were regularly conducting business through personal devices, they were ignoring firm policies on the subject, and at the end of the day, that's really dangerous for the company.

Allie Kushner: Right, that makes a lot of sense, and you know good training should help avoid some of those issues. So, now turning back to antitrust risks, Dana, what other antitrust concerns should folks in the financial services sector be on the lookout for?

Dana Cook-Milligan: So, another issue to be wary of would be claims of group boycott, whereby a group of industry players are perceived as being pitted against another party in the industry—either an existing member of the industry, but often against a new entrant in the market—so, a vendor, or a new services provider that enters, or is attempting to enter, the market.

Often, when a new entrant seeks to establish itself in that new market, other firms that already exist in the market may come to a conclusion about the impact that new entrant may have. For example, industry players may end up having the same conclusions about the new entrant's controls, their technology, their market readiness. And, if there are consistencies in the way that other industry players are viewing that new entrant, plaintiffs' firms may see that as an opportunity to claim that those existing members are engaging in a group boycott against the new entrant.

Eva Cole: I agree this is a real concern, both from the perspective of potential private lawsuits that companies might face, but also from a government enforcement perspective. The DOJ's Antitrust Division, for example, has made clear that it's particularly concerned with potential anticompetitive conduct against FinTech companies and other market entrants that seek to disrupt the status quo. The FTC has stated that it will bring standalone enforcement actions under Section 5 of the FTC Act, which prohibits unfair methods of competition. One of the areas that they have specifically indicated that they might be pursuing under that statute is unfair behavior against new entrants into different industries. So, this is a real area to be aware of.

Allie Kushner: So, what should firms do to minimize those types of risks of group boycott claims?

Dana Cook-Milligan: Well, this would go back to, in part, what I was saying earlier about document hygiene. Firms should make exclusively independent decisions about whether they will utilize that new entrant into the market, and they should document those reasons so it is clear that any decision they make about whether they will or won't work with a new entrant was an independently made decision. Separate from document hygiene, they should also be exercising extreme caution in sharing information with their competitors about those new market entrants.

Allie Kushner: Those are great tips. Thanks, Dana. Finally, I'd like to switch gears to discuss consumer issues that continue to present enforcement and litigation risks for financial services firms. Dana, can you please give us a quick rundown of some of the key consumer protection concerns in this sector?

Dana Cook-Milligan: Sure. So I'll say at the outset that some of these are not specific to the financial services industry. Some are. For example, top concerns would be discrimination, privacy and data protection, overdraft fees, and compensation that is tied specifically to sales goals.

Allie Kushner: Okay, let's take those one by one. First on discrimination, what are the rules, and what can firms do to mitigate risk?

Dana Cook-Milligan: So, taking discrimination to start, financial services firms should ensure that they have robust programs in place that they not engage in unlawful discrimination on the basis of race, color, national origin, or religion, and that's including in connection to lending funds to individuals and businesses and providing mortgages. It is not enough to just have a policy on the books. This goes back to a little bit of what we were discussing earlier that your policy should also be accompanied by rigorous training of your employees to ensure that there are no violations of these. The DOJ and other regulators are continuing to aggressively investigate potential violations, and you should also keep in mind that allegations of unlawful discrimination can lead to pretty robust civil suits that may follow.

Eva Cole: So, I'll just add that this issue is top-of-mind for government enforcers, particularly with respect to emerging technologies like AI. The DOJ and FTC, along with the Consumer Financial Protection Bureau and the Equal Employment Opportunity Commission, actually just issued a joint statement on enforcement efforts to protect the public from bias in automated systems and artificial intelligence. So, this is just a reminder that the antitrust laws, the federal consumer financial laws, and other statutes apply with equal force to automated technology and of the agencies' commitment to really scrutinize any unlawful conduct that leverages such technology. So, it's just an area that you really have to keep an eye on.

Allie Kushner: Those are great points, especially as businesses are grappling with how they are going to integrate AI into the next phases of their business operations. So, Eva, what else can you tell us about privacy and data protection considerations?

Eva Cole: Well, it'll be no surprise to folks involved in the financial industry to hear that financial firms really need to make sure that their technology is sufficient to guard consumers' personally identifying information.

Regulators want to see that financial firms have ironclad controls to ensure that they're not susceptible to hackers, that they have the means to discard technology properly that houses consumers' private information. This is an area where, if you do not have appropriate safeguards and practices, that can lead to civil suits because consumers can bring substantial litigation if they find that their financial institution was inadequately protecting their personally identifiable information. So, it's just an area where you really need to make sure that you have the protections in place to really safeguard this information.

Allie Kushner: I see. That all makes sense that the technology has to be robust to make sure that any personally identifying information is not susceptible to hacking.

So finally, Dana, let's turn back to you for tips on the last two consumer issues you mentioned: overdraft fees and compensation structure.

Dana Cook-Milligan: Sure. So let's start with overdraft fees. We continue to see litigation and regulatory inquiries into the use of overdraft fees, including, in particular, when it's not clear to consumers that they'll face these overdraft fees, but then a financial institution collects that fee anyway.

Financial firms should review their disclaimers on overdraft fees and make sure that they are clear, and that their firms follow those disclosures and internal policy—meaning, a consumer should be aware, through documentation related to their account, of what potential overdraft fees may apply and when. And if that isn't clear, then such disclosures should be updated.

Then, looking at compensation structures, financial firms should also be careful about implementing programs that allow their employees to financially benefit specifically because they hit their sales goals. If their compensation—either their base compensation or their bonus structure—is directly tied to meeting certain sales goals, that may affect the decisions that that particular employee is making at their job.

Regulators have found that programs that tie sales and compensation together often have led to legal violations, both in the antitrust space and otherwise, including improper registration of credit cards without the consumers'

permission. Once a regulator is clued in on an issue like this, either related to overdraft fees or compensation structures being tied to sales, you will often find that civil suits will follow.

Allie Kushner: Thank you, Dana, for that helpful overview. And thank you both for this discussion. Eva, do you want to give us a brief recap of some of the key takeaways from what we've discussed today?

Eva Cole: Absolutely, let me give you three:

1. So first, given the current instability in the banking sector, it's a great time for in-house teams to consider sending an antitrust compliance reminder or conducting a "refresh" training on "do's and don'ts" of competitor contacts as well as on document hygiene issues.
2. Second, to minimize claims of group boycott, firms should avoid sharing information with competitors about new market entrants, and they need to make their own decisions about whether to utilize a new entrant to the market completely independently.
3. Finally, financial firms continue to face litigation and regulatory risks around a variety of consumer issues, including discrimination, data privacy, security, overdraft fees, and compensation structures that may incentivize unlawful outcomes. It's really important to implement strong internal controls around these issues as well as compliance training to minimize risks.

Allie Kushner: Thank you very much to Eva Cole and Dana Cook-Milligan for joining today's episode of Winston's Women in Antitrust Series and giving the financial services sector a lot to think about. Please be sure to subscribe to Winston's Competition Corner blog for antitrust updates delivered straight to your inbox. Thanks so much for listening.

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