

With Visa-Plaid deal closing five months delayed already, Feds accuse Bain & Co. of stonewalling on pricing strategy documents that cast light on anti-trust hotspot

Makan Delrahim says he won't let Bain run out the clock and the assistant US Attorney sued for the documents as part of the DOJ's antitrust investigation.



October 28, 2020 – 10:02 PM by Oisin Breen

Brooke's Note: To relay this article and all its meaning, Oisin Breen had to seek out experts in law, technology, finance and business. A lawsuit filed against Plaid by TD Bank, and a now consolidated class action add a final kink. The DOJ is worried that Visa could compete unfairly against the world of financial software applications that keep it in check -- and it believes its consultant, Bain, can not invoke the equivalent of attorney-client privilege. So much is riding on this ruling for world payments, but also its secondary effects could have specific effects on the RIA business.

Makan Delrahim: Both venture capital and antitrust are often about predicting the future competitive dynamics of competition... [and] tough decisions are necessary not only to survive but to thrive.



0 Comments

Visa's blockbuster acquisition of fintech firm Plaid has been snarled in a legal thicket, after the Department of Justice (DOJ) put the squeeze on Visa's consultant as part of an antitrust investigation into the deal. The January deal was already deep into extra innings, with a [projected closing for June](#) but now it's seemingly delayed indefinitely.

The DOJ yesterday (Oct. 27) filed a petition in federal court charging that Boston-based Bain & Co. had stymied its antitrust investigation into Visa's \$5.3 billion purchase. See: [Visa gambles \\$5.3 billion that Plaid will pay Big Data dividends](#).

Using a third party isn't a shield for turning over evidence, says Makan Delrahim, an Assistant U.S. Attorney for the Antitrust Division, based on his statements in a release.

"Collecting relevant third-party documents and data is essential to the division's ability to analyze these transactions. Too often, third parties seek to flout these requirements, hoping the division will lose interest and focus its enforcement efforts elsewhere."

But the sensitivity to what firms of such immense power is especially prone to set off overseers, says Ari Sonneberg, partner and chief marketing officer at Boston-based Wagner Law Group, via email.

"The power of Visa and Mastercard over their industry has long been on the radar of lawmakers and the DOJ."

"It's no surprise that this deal is the subject of intense scrutiny."

"Visa could use Plaid ... to give advantage to its payments rails -- and without a doubt this logic drives the deal -- but I don't see it as a monopolistic tendency," adds Lex Sokolin, global fintech co-head at New



Ari Sonneberg: It wouldn't be the first time a lawsuit was commenced with the simple goal of putting the kibbosh on an M&A deal.

York City blockchain software company, ConsenSys, via email.

The DOJ will likely agree, eventually, Sonneberg adds. "Plaid would definitely strengthen Visa, [but] I don't think it rises to the level of anti-competition needed to prevent the deal from happening."

Indeed, UK regulators came to a similar conclusion.

On Aug. 24, the Competition and Markets Authority rejected claims of a potential monopoly, and ruled that several firms "already posse[ss] similar, or stronger, competitive capabilities [to] Plaid."

Forcing compliance

The department seeks to force Bain's compliance with a Civil Investigative Demand (CID), roughly the equivalent of a subpoena, to support its investigation of Visa's proposed acquisition, a [DOJ release](#) states.

The regulator's move follows a June 11 request for Bain to document work it did for Visa in the run-up to the deal, according to the release.

Bain has allegedly failed to provide details about its discussions with Visa involving its pricing strategy and competitive position.

The DOJ did not respond to a request for comment; a Bain spokesman stated that the firm is "unable" to comment.

San Francisco, Calif.-based Plaid, and Foster City, Calif.-based Visa also declined to comment. Nor would Visa answer whether the DOJ's latest move will push the deal's potential closure into 2021.

In July, CEO AI Kelly confirmed the initially expected summer close had been moved till the end of the year.

"We certainly are expecting to close by the end of the calendar year and are doing everything we can to comply with any request from the regulators," he said in a July conference call.

Court documents also revealed that DOJ lawyers deposed Kelly earlier this month.

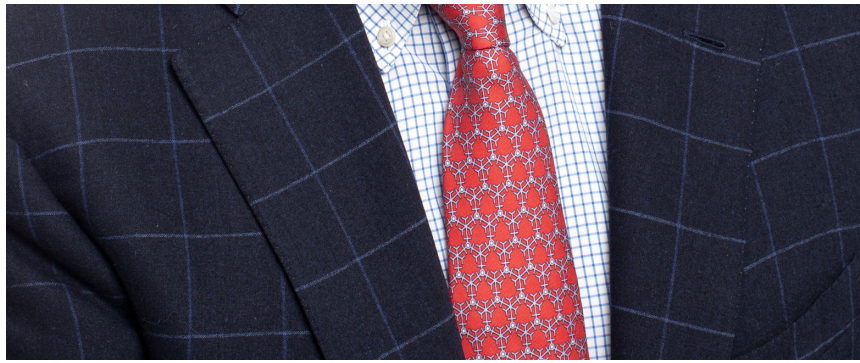


Jonathan Holtway: Visa acquiring any company [Plaid] that has the potential to develop serious payment alternatives is anti-competitive.

High stakes

The outcome of the investigation could have significant ramifications for RIAs.





Al Kelly told investors in July that Visa's acquisition of Plaid would close by year-end 2020.

The DOJ's concern seems to focus on the fact that Visa is primarily owned by 13,000 U.S. financial institutions. The company processes credit card transactions between merchants and banks, without direct bank intervention.

Plaid software supports apps like Venmo, Stripe and Square that enable bank-account-to-bank-account payments essentially bypassing card networks.

Plaid also provides account aggregation services that allows advisers to track credit card, bank, investment, email and other accounts on one screen; and Plaid owns RIA data aggregator, Quovo. See: [Plaid, valued at \\$2.65 billion, makes \\$200-million snack of Quovo -- albeit defensively -- and creates Yodlee super-foe.](#)

If the acquisition goes through, Visa would have commanding position as a significant toll collector for a vast swath of robo-advisors, robo-banks and other "fintech apps." It would be able to tap streams of financial data coursing through banks, custodians and brokerages, globally.

Given Visa's \$29.6 billion market cap, it could big-foot competitors like Chicago-based Envestnet, which owns account aggregator Yodlee, and control competing banking services.

Visa also handled some \$2.2 trillion in credit, debit, and pre-paid transactions in the first six months of the year alone, according to data from the Nilson Report. Mastercard, the second largest, handled \$942 billion, during the same period.

Squaring off

The DOJ filed its petition in the U.S. District Court for the District of Massachusetts seeking a court order to enforce its CID.

It alleges that Bain has withheld important documents by asserting "unsupported claims of privilege," said Delrahim.

"Bain, must comply fully and expeditiously with our civil investigative demands and provide the documents and data we need to discharge our duties."

The DOJ is reportedly preparing an antitrust suit, including lining up trial witnesses, according to the [Wall Street Journal](#) (WSJ).

The regulator is concerned over the deal's potential to stifle competition in the payments business.

Indeed, legal filings state that the DOJ fears green-lighting the Plaid deal could "allow Visa -- the dominant provider of debit services in the United States -- to create or maintain a monopoly."

Mastercard, the second largest credit card company also snapped up its own aggregator, Finicity, in June for \$825 million -- over 50 times the latter's revenues. That deal is also under DOJ review.

Sonneberg says the DOJ's suit against Bain shows "it doesn't, at this point, have a case for nixing the deal, but is genuinely performing due diligence and not rubber-stamping the acquisition."

The DOJ argues that Bain doesn't appear to have the same confidentiality privileges that would exist between an attorney and client.



Lex Sokolin: Perhaps there is a connection between banks and broker-dealers wanting to defend their business and data.

But Sonneberg sees a scenario where the privilege may apply.

"If their consulting was performed in connection with an anticipation by Visa of legal action ... it might very well be privileged, and thus out of the DOJ's reach," he says.

Toughening the base

The DoJ also recently strengthened its capacity to carry out antitrust investigations in financial technology.

In August it consolidated its financial sub-divisions into one unit, and in June its Antitrust Division agreed closer cooperation with the Securities and Exchange Commission.

Financial technology will become an increasing focus of the DoJ's antitrust division, Delrahim said in a [virtual speech](#) (Aug 20) to the Rock Center for Corporate Governance at Stanford University, in which he detailed changes at the department.

Delrahim was nominated for his position in March 2017. His appointment was approved by a Senate majority in September 2017.

"Both venture capital and antitrust are often about predicting the future competitive dynamics of competition ... [and] tough decisions are necessary not only to survive but to thrive," he explained during his speech.



Makan Delrahim: Collecting relevant third-party documents and data is essential.

Monopoly games

If the Plaid deal passes antitrust muster, Visa will have access to the data of over 200 million consumer bank accounts at 11,000 firms, and connections to 2,600 financial technology applications.





Eduardo Coello: The acquisition will accelerate Visa's ability to create innovative and accessible digital payment solution.

This could boost its push into real-time payments and digital wallets, as well as ward off future competition from firms like Venmo.

"[It could] make competition more difficult ... [if Visa used] its size to get banks to provide bespoke integrations, while other aggregations have to rely on screen-scraping," says Sokolin.

Screen-scraping uses consumer logins to download vast swathes of data from banks without banks overt consent.

But should the DOJ reject Visa's acquisition of Plaid on antitrust grounds, it would cause hell for firms attempting to modernize, sources state.

"Visa, Mastercard, as well as FIS and Fiserv have been ... consolidating the payments markets with other financial sectors, like banking, [and] financial technology ... because pricing ... is contracting due to digital systems," Sokolin continues.

"An arbitrary block in this particular case would be hard to interpret for a finance company trying to modernize for the next generation."

But Visa is unlikely to sit on the sidelines for too long, says Sonneberg.

"If the deal fails, I think Visa will bide it's time to see what happens with the upcoming election and possibly take another shot at a similar deal during perhaps a friendlier DOJ under a Biden administration, or wait out a second Trump term if need be," he argues.

"Visa will still be a powerhouse ... [and] if it isn't Plaid today, it will be something else at another time."

Indeed, on Oct. 27, Visa bought Miami, Fla.-based software integration vendor Yellow Pepper to support its "goal to be a single connection point for the movement of money ... everywhere," according to a [release](#).

"The acquisition will accelerate Visa's ability to create innovative and accessible digital payment solution," says Eduardo Coello, Regional President for Visa Latin America and the Caribbean, in the release.

Reasonable alternatives

Visa's potential acquisition of Plaid has also irked its core banking clientele, sources state.

Plaid provides technology to a host of neo-banks and payment vendors that intend to disrupt traditional banking services.

Toronto-Dominion Bank (TD) sued Plaid on Oct. 14 alleging seven breaches of federal and New Jersey state law, including trademark counterfeiting and unfair competition.

Plaid also faces two fraud class actions filed May 4 and July 17. Three linked cases were consolidated into a single class action as of Aug. 17. See: ['Fraud' lawsuit slams Plaid on eve of historic \\$5.3-billion payday; some experts say it's a 'fishing expedition,' but plaintiff's lawyers say, 'This is no shakedown' -- Second suit follows in July](#)

TD Bank's suit against Plaid could well be a salvo that demonstrates the sector's frustration, says Sonneberg.

"Banks are Visa's core customer, and Plaid is designed to be a disruptor of [the] traditional banking system," he explains.

"It wouldn't be the first time a lawsuit was commenced with the simple goal of putting the kibbosh on an



Bill Singer: I see no quick approval or rejection by DOJ of the Plaid-Visa transaction.

M&A deal."

The reality is that Plaid left TD with no choice, says the bank's president and CEO, in a statement

"After repeated attempts to work through these issues with Plaid, TD is taking legal action to protect our customers and our brand," he says.

Banking blues

But former banking consultant Jonathan Holtoway says Visa and MasterCard operate a near duopoly, which makes the former's purchase of Plaid potentially problematic.

"The national franchise banks that issue most of the credit and debit cards are part and parcel with that system," he explains, via email.

"Visa acquiring any company that has the potential to develop serious payment alternatives is anti-competitive and banks have reason to prefer alternatives," continues Holtoway, now president and manager of Vienna, Va.-based private equity firm and asset manager Ategra Capital Management.

Indeed, where Visa can spend its way out of trouble, smaller firms can't, so it wouldn't be a surprise if the banking lobby pressed the DoJ to act, says Sokolin.

"Perhaps there is a connection between banks and broker-dealers wanting to defend their business and data, and an attempt to slow down Visa and Plaid from coming together."

On Oct. 23, Plaid also began advertising for an 'ecosystem leader', ostensibly to improve its relationship with banks.

Plaid's clients include European digital bank Monzo, digital brokerage Robinhood Markets and Venmo.

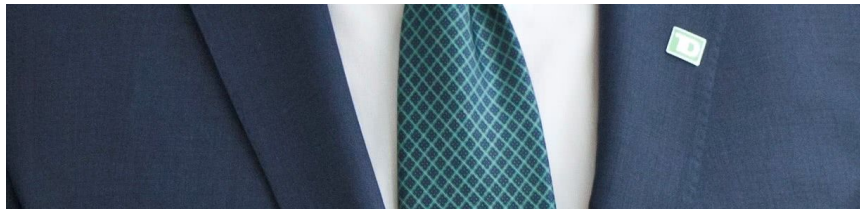


Natalie Giannangelli: We were surprised by TD Bank's decision to file suit in the midst of our good faith discussions.

Suits you

The timing of TD Bank's suit against Plaid, not to mention the now combined class action suit is, however, "awkward", given the DOJ's fresh moves, a number of sources admit.





Greg Barca: After repeated attempts to work through these issues with Plaid, TD is taking legal action.

Indeed, the sheer number of legal brushfires emerging could drive Visa away, says Sonneberg.

"It's unlikely Visa would have been buying Plaid, small potatoes for Visa, if all this litigation were in the works before the deal had been penned."

TD alleges that Plaid uses spoofed login pages to "dupe" consumers, capture their data and resell it. The bank filed its suit, after Plaid rejected an Apr. 17 letter demanding it make changes, according to [court documents](#).

TD's suit references similar sources and levies similar allegations to the now amalgamated class action, but the latter also alleges that Plaid modified its software's processes after the initial suit was filed. See: ['Fraud' lawsuit slams Plaid](#).

Both cases centre on Plaid's use of screen-scraping; its alleged mimicking of branded user-logins; and the alleged sale of data to third parties.

They also reveal the failure of industry attempts to pre-empt such difficulties by banding together to form a data gathering code of conduct, SODA. See: [Envestnet quietly deals rivals in on Yodlee play to placate big banks and their latent threat of 'oblivion' in response to 'screen scraping'](#).

SODA has since fizzled. Many aggregators now defer to the financial data and technology association, according to Chicago, Ill.-based Morningstar.

But Plaid, which previously described the class action suits as "baseless", insists on its innocence.

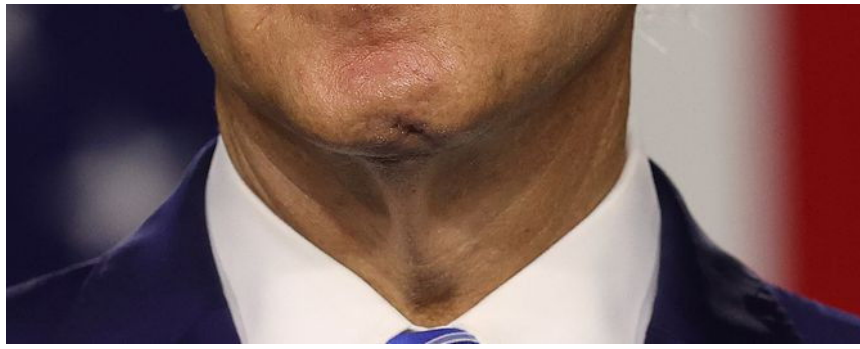
"We were surprised by TD Bank's decision to file suit in the midst of our good faith discussions, which are still ongoing ... [and we] are disappointed that they resorted to litigation and false allegations" says Plaid spokeswoman Natalie Giannangeli, via email.

Plaid's legal team, headed by white-shoe law firm Gibson Dunn & Crutcher in Los Angeles, Calif. did not respond to two separate requests for comment. Nor did Oakland and Newport Beach, Calif. practice Herrera Purdy, or Los Angeles, Calif.-based Tostrud Law Group, both of which were involved in initial class action suits against Plaid.

Electioneering

Some sources argue that the suits against Plaid are the inevitable "shakedown" that follow a blockbuster deal.





Industry observers expect Joe Biden to be more zealous in his support of antitrust investigations, should he win the US Presidential election on Nov. 3.

But their number -- and present events -- compounds the likelihood that Visa's acquisition will face significant delays, says Bill Singer, attorney and writer of the [Broke and Broker](#) blog.

"With the combination punches of Covid-19, the US Presidential election, and pending litigation, any acquisition ... could be staggered," he explains, via email.

Should Biden win the White House on Nov. 3, antitrust enforcement could also increase. Biden is on record as stating that near monopolies threaten the "American values of competition, choice and shared prosperity."

Indeed the election is likely to see this antitrust investigation run and run, Singer continues.

"I see no quick approval or rejection by DOJ of the Plaid-Visa transaction until the dust settles.

No people referenced

[Envestnet](#) | [Quovo](#) | [Yodlee](#) | [Visa Inc.](#) | [Plaid](#)

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