

News from our Antitrust & Trade Regulation Group

Analyst Calls: Another Reason to Exercise Caution— FTC Challenges CEO's Statements as an "Invitation to Collude"

A recent Federal Trade Commission suit challenging statements made during a U-Haul quarterly conference call with securities analysts should raise red flags with company executives and their general counsels about potential antitrust liability.

The FTC announced a consent agreement with U-Haul International, Inc. and its parent, AMERCO, last month, resolving charges that U-Haul engaged in "unfair methods of competition" in violation of Section 5 of the FTC Act by calling on Avis Budget Group, its closest competitor, to raise prices. The FTC action is subject to public comment until July 9, after which the Commission is expected to issue its complaint and final order.

The FTC's allegations against U-Haul

The specifics of the FTC U-Haul allegations are instructive.

According to the FTC, price competition was forcing U-Haul, the largest consumer truck rental company in the United States, to lower its rates for one-way truck rentals. The FTC alleges that, aware of the situation, U-Haul's CEO made statements during an earnings conference call suggesting that U-Haul would raise its rates and would maintain those rates so long as Budget did not respond in a way that would take away market share.

During opening remarks on the analyst call, U-Haul's CEO said only that the company was making efforts "to show price leadership." However, when asked for additional

information, the CEO discussed the pricing signals he was sending to the company's competitors in greater detail: "as I talked about earlier, me trying to get us to exercise price leadership every time we get what we consider to be an opportunity, it's another indicator to them as to, hey, don't throw the money away. Price at cost at least."

He then went further, advising that U-Haul would wait longer, for the competition to respond, saying, "if they perceive that we'll let them come up a little bit, I remain optimistic they'll come up, and it has a profound affect on us." He then specifically suggested, according to the FTC's interpretation, that U-Haul would keep its rates unchanged so long as Budget would raise its rates to within 3 to 5 percent of U-Haul's: "it's not that hard in the economy to justify 3 or 5% with service in my belief. Now you have to really do it, but I believe we have it and I believe we can really do it. And so that's where I'm driving my people who are delivering the product. I'm not driving them hard on match, match, match."

Public and private invitations to collude

The FTC complaint alleges an "invitation-to-collude," charging that a solicitation to a competitor to fix prices or divide markets is itself a violation of the FTC Act even if it does not lead to any agreement. Most such cases have been based on private invitations—which if accepted would have amounted to criminal price fixing. The DOJ

has even brought mail and wire fraud cases against such conduct.

In one infamous case, the President of American Airlines, Robert Crandall, called the President of Braniff, who taped the call and turned it over to the government. Crandall bluntly proposed, "raise your god-damn fares twenty percent [and] I'll raise mine the next morning." He added, "you'll make more money and I will too." The Justice Department challenged that conduct as attempted monopolization, albeit a "shared" monopoly, based on the companies' combined market share.

Since the early 1990s, the FTC has challenged similar private invitations under the FTC Act, regardless of market structure. FTC officials have argued that such suits should deter price fixing, and not to bring such cases would give price-fixers a "free bite at the apple" since if an invitation is accepted, the resulting agreement might never be detected.

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The FTC action against U-Haul is significant because it is not based on a private telephone call or clandestine meeting with a competitor, but rather on public statements to stock market analysts, which were recorded and widely distributed.

The FTC has brought one similar case, in 2006, against Valassis Communications, Inc., a leading producer of freestanding newspaper inserts, for detailing its strategy to increase market prices in opening an earnings call. The U-Haul case goes even further because the challenged comments were made in response to analyst questions.

The fact that an invitation is made in a public forum does not immunize the communication, although FTC officials have in the past recognized that public companies have a legitimate interest in communicating with investors about financial results and business strategies.

The FTC's concern with public invitations is that they may facilitate collusion by disclosing the solicitor's intentions and preferences even if an agreement can not be proven. Thus, they should be of greatest concern in concentrated markets, and the FTC alleges that U-Haul and the target of its invitation, Budget, together account for 70 percent of one-way truck rentals in the United States. On the other hand, the Commission has said it need not show market power in order to bring a case. Thus, firms should be cautious of what may be said during analyst calls, even in less concentrated markets.

Notably, the FTC order against U-Haul has a proviso to allow public disclosure as required by the federal securities laws. And the FTC has also said that it "would likely not interfere" with a public communication that is required by the securities laws. Still, a respondent might be able to argue in a future case that a similar antitrust challenge is precluded by the securities laws given the risk of conflicting duties.

Most companies, however, will not want to chance becoming the target of the FTC's next enforcement action.

Recommendations

The U-Haul action should cause public company general counsel to review prepared statements for conference calls and draft answers to possible analyst questions with an eye for antitrust as well as securities issues, and to advise top executives:

- ▶ not to use quarterly earnings calls or other presentations to investors to communicate to competitors;
- ▶ to focus on the company's actions and use caution when talking about competitors' actions or industry actions;
- ▶ to be cautious when talking about future pricing and output; and
- ▶ that analyst calls are monitored and transcripts scrutinized by antitrust enforcers as well as securities regulators and plaintiffs' attorneys.

The FTC press release announcing this action and its proposed complaint and order are available at <http://www.ftc.gov/opa/2010/06/uhaul.shtm>. ■