

Avoiding Antitrust Traps in Investor and Analyst Calls

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Introduction

- ◆ Investor/analyst/earnings conference calls
 - Who's listening?
 - Why are they here?
- ◆ Why is the issue emerging now?
- ◆ FTC Enforcement Action against U-Haul (June 9, 2010)
- ◆ Topics we will cover today
 - Development of analyst calls, disclosure requirements and practices
 - Antitrust challenges based on statements during calls
 - Potential litigation based on conflict between disclosure and antitrust
 - Practical advice to avoid being the test case

Development of Investor/Analyst/Earnings Conference Calls

◆ Regulation of calls

- Regulation FD: generally requires that calls be open to all

◆ Why have these calls?

- Encourage disclosure and increase investor confidence
- Satisfy analysts

◆ The obligation to disclose: legal and practical

- The risk of the non-answer

◆ How do the calls typically work?

- Statements (can be reviewed in advance)
- Q&A (can't be reviewed in advance)

Antitrust Challenges Based on Statements In Calls

- ◆ Why are private plaintiffs listening?
 - Pleading requirements are more rigorous after Twombly
- ◆ Why is the government listening?
 - Belief that companies signal one another
- ◆ Theories of antitrust liability
 - Conspiracy facilitated by analyst calls
 - Invitations to collude and unlawful signaling
 - Recent FTC Consent in U-Haul
- ◆ Limitations of theories
 - Must prove conspiracy and that's not easy
 - Invitation to collude theory has limited acceptance

Antitrust and Disclosure: Conflict and Immunity

- ◆ The conflict between antitrust and disclosure
- ◆ Are statements impliedly immune?
- ◆ *Credit Suisse v. Billing*: 4-part test
 - Heartland of securities regulations
 - Clear and adequate SEC authority to regulate
 - Active and ongoing SEC regulation
 - Serious conflict between the antitrust and regulatory regimes
- ◆ Practical limitations of Billing defense
 - Is an explicit offer and acceptance of a price fix really something that the Supreme Court meant to render immune?

Avoiding the Antitrust Traps: Practical Advice

- ◆ Know danger zones
- ◆ Be only as specific as you need to be
- ◆ Focus on your own company
- ◆ Be definitive in explaining future actions
- ◆ Some things are better left unsaid

Example 1: “Watching Our Competitor”

◆ From an FTC Consent Decree

- CEO announces policy of: (1) no discounts for new customers but (2) continuing discounts for existing ones
- CEO states: “In the recent past [Competitor] has been quick to make their intentions known. We don't expect the need to read the tea leaves. We expect that concrete evidence of [Competitor's] intentions will be available in the marketplace in short order. If [Competitor] continues to pursue our customers and market share, then we will go back to our previous strategy.”

Example 2: “Describing Competitor’s Pricing”

◆ From an FTC Consent Decree

- Analyst: Would you describe the current pricing environment as more competitive than usual or kind of within line of the natural competitiveness of the market? Is there any hope or are you optimistic in any way over the next year or two that this can get resolved?
- CEO response: [Competitor] appears to be continuing [to] undercut as their sole pricing strategyIt’s when somebody decides they have to gain share from somebody that you get this kind of turbulence that results in no economic gain for the group, in fact probably economic loss. So I remain encouraged and the official position of [Competitor] is that they’re not doing this. . . . But many a slip between the cup and the lip If they cave on prices the net effect is we got less money.”

Example 3: “We’ll Increase Prices if Our Competitor Does”

◆ Modified From Pending Complaint

- Analyst: you don’t have [a specific surcharge/fee], do you and will you?
- Executive: Good question. Let me tell you what we’ve done. We have the appropriate programming in place to initiate a fee and at this point we have elected not to do it, primarily because our largest competitor hasn’t done it, and I think we don’t think we want to be in a position to be out there alone with a competitor who we compete on probably 80% to 90% of our revenue is not doing the same thing. So I’m not saying we won’t do it, but at this point, I think we prefer to be a follower in a situation rather than a leader right now.
- Analyst: But if they were, you would consider it?
- Executive: We would strongly consider it, yes.

Example 4: Speaking for the Industry

Adapted from pending complaint:

◆ In response to a question about inventory levels:

Executive states:

- “Our policy, our strategy, has always been minimizing our inventory and that turned out to be quite successful in past few years by keeping the inventory lower. And I think in the past we did have some problem convincing our competitors doing the same thing. But in recent months, especially this year, actually, it did start to happen. I think that the industry understands the benefit of keeping the capacity low.”

Example 5: Response To Competitor's Threat of Price War (A Hypothetical)

- ◆ Analyst: In reading the transcript from your competitor's earnings call, they said that they would inject "tremendous price pressure" back into the marketplace. Can you finally comment on this or maybe let us know how you would respond if your competitor ended up slashing prices?
- ◆ Executive: We think our competitor will act in their own interest and we will do the same. It's probably not a good practice to answer hypotheticals here. But I think that the thing that's important is that we are seeing price stability in the market. And we would expect them to be a rational competitor.

Example 6: Thanking the Industry for Pricing Discipline (A Hypothetical)

- ◆ “We are pleased to announce increased earnings in the midst of the tough economic environment. The economic downturn in the United States continues to impact our industry adversely. However, we were able to increase our margins despite declining unit volumes and raw material costs. We are pleased that our industry exhibited some measure of pricing discipline in response to those two trends. Price discipline by the industry participants has returned.”

Example 7: It's OK for an Executive to Pass (A Hypothetical)

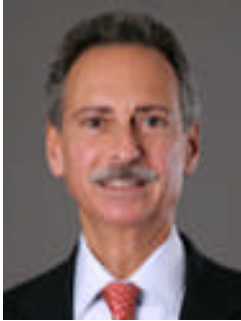
- ◆ Analyst: Could you just elaborate a little bit more on price discipline as you're seeing it right now, specifically about the other companies in the industry sticking with the price increases?
- ◆ Executive: I mean obviously I can't comment on anyone or anything. I can tell you that we generally are the price leader. But in terms of commenting on competitors or what we're going to do or anything else I really can comment on that so I apologize but I really can't answer your question.

Questions & Answers



Thank you

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