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Avoid the **Traps** in Investor And Analyst **Calls**

FOR MOST PUBLIC companies, periodic conference calls and webcasts with investors and financial analysts are a fact of life. These communications promote confidence by disclosing earnings information and describing decisions, strategies and challenges that could affect earnings. The calls typically are open to the public so that companies may avoid "selective disclosure" issues, and they often include questions and answers regarding competitive conditions.

BY RICHARD STEUER, JODI SIMALA AND JOHN ROBERTI

Widely accessible investor and analyst conference calls attract two types of visitors who otherwise would not have been present: competitors and the government.

For competitors, the calls provide a rich source of competitive intelligence.

Antitrust enforcers at the Federal Trade Commission and the Department of Justice also are aware of these calls. The government knows that competitors can and do listen to investor and analyst calls, and may view them as opportunities for companies to signal one another.

Even more aggressive eavesdroppers also may be listening: antitrust plaintiffs' lawyers listening for opportunities to mount a conspiracy claim.

This article describes these developments, and provides guidance for public companies trying to avoid antitrust pitfalls.

Public companies provide investors and the analysts who follow them with information about the company's performance on a periodic basis, and in many cases that information includes guidance for the future.[1]

Providing periodic information about the company's earnings, and performance generally, can help ensure that analysts' forecasts are more reliable, and stock prices are less volatile.[2] As a practical matter, many public companies provide information in order to keep investment analysts informed.[3]

In typical earnings calls, companies often take questions and answer not only questions about past performance but also inquiries about expected performance, business plans and strategies. These questions often can lead to discussions about competitive strategies, including plans for pricing, output and dealing with the competitive environment.

Regulation FD, the Securities and Exchange Commission's rule prohibiting selective disclosure adopted in 2000, makes clear that a company may not disclose material, non-public information in a call with investors or analysts unless the call is made available to anyone who is willing to dial in. Analysts have continued to ask about material information that could be competitively sensitive, and executives have been frank in their answers.[4]

> Antitrust **enforcers** at the FTC and DOJ know that **competitors** can and do listen to investor and analyst calls, and may view them as **opportunities** for **companies** to **signal** to one another.

The difference between the world prior to Regulation FD and the world after it is that competitors now have more ready access to this information as well. Competitors' access has changed the character of the communication, and increased the antitrust risk.

The Antitrust Risks

Companies can face antitrust liability from statements made during investor and analyst conference calls if the statements amount to "signaling" competitors in an effort to instigate an agreement on prices, output or other competitive terms.

There are two approaches that antitrust enforcers and plaintiffs pursue in confronting these statements, each of which is described below.

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Invitations to Collude. An "invitation to collude" claim involves a specific, directed offer from one competitor to another to agree on issues of competitive significance, such as price or output, where that offer is not accepted. The best known "invitation to collude" case was *United States v. American Airlines Inc.*[5]

There, American's president, Robert Crandall, called his competitor and said "Raise your goddamn fares 20 percent. I'll raise mine the next morning… You'll make more money and I will too."[6]

Thinking ahead, this competitor had taped the conversation and turned the tapes over to the Department of Justice. As a result, the DOJ charged American and Mr. Crandall with an attempt to monopolize through an invitation to collude. The case eventually settled.

Over the next 20 years, the government brought a series of cases under invitation to collude theories that typically involved: (1) a direct communication between competitors; (2) in which a specific and unequivocal offer was made; and (3) the only thing preventing an unlawful agreement from being formed was the offeree's failure to accept the offer.[7]

At least once, antitrust enforcers have applied the "invitation to collude" theory to investor and analyst conference calls.

In *In re Valassis Communications Inc.*,[8] which resulted in an FTC consent decree, Valassis' CEO opened an analyst call with a prepared statement detailing the company's strategy to end a three year price war with News America, its only competitor in the advertising insert business. Valassis' CEO stated that Valassis would quote customers of News America the same price that had been in effect three years prior, and would not go below that price. Outstanding price quotes below that price level would shortly be revoked.

At the same time, Valassis' CEO promised to "defend our customers and market share and

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use whatever pricing is necessary to protect our share." He then stated that Valassis would watch for News America's reaction.[9]

The FTC staff claimed these statements went "far beyond a legitimate business disclosure" and that there was "no legitimate business justification to disclose the information." The FTC charged that Valassis would not have disclosed such detailed information except to communicate it to News America, and Valassis knew News America would be monitoring the call.[10]

At the same time, the FTC recognized that "[c]orporations have many obvious and important reasons for discussing business strategies and financial results with shareholders, securities analysts, and others" and that antitrust challenges are appropriate only in the "limited circumstances" where the "information would not have been publicly communicated, even to investors and analysts interested in [the company's] business strategy, but for [the company's] effort to induce collusion."[11]

Anti-Competitive Agreements. Section 1 of the Sherman Act prohibits agreements that unreasonably restrain competition.[12] When companies act in parallel with respect to pricing, output reduction or other competitively significant decisions, antitrust enforcers and plaintiffs may suspect that there is an agreement guiding the behavior.

The U.S. Supreme Court has made clear, however, that parallel behavior, standing alone, is not sufficient to prove a conspiracy.[13] Therefore, plaintiffs alleging an antitrust claim based on parallel conduct among competitors must allege facts, in addition to the parallel activities, that may support an inference of an agreement.

Prior to 2007, many plaintiffs, relying on liberal pleading standards, alleged parallel conduct along with generalized allegations of conspiracy with the hope of finding something concrete in discovery.[14] However, in *Bell Atlantic Corp. v. Twombly*,[15] and subsequently in *Ashcroft v. Iqbal*,[16] the Supreme Court held that plaintiffs must plead specific facts that support collusion.

Following *Twombly* and *Iqbal*, several lower courts have required plaintiffs to plead facts such as dates and times of alleged meetings, participants in alleged meetings, and similar details.

In response to heightened pleading requirements, plaintiffs began looking harder for public statements, including investor and analyst call transcripts, to find evidence of signaling that, combined with parallel conduct, might be sufficient to state a claim. In *Avery et al. v. Delta Air Lines Inc.*,[17] for example, a plaintiff alleged that Delta and AirTran conspired to set the fees for the handling of baggage based on a statement made by AirTran's CEO during an earnings call.

In response to a question from an analyst, AirTran's CEO explained that AirTran had not instituted a baggage fee because Delta, its largest competitor, had not initiated such a fee. He stated that AirTran would consider such a fee if Delta instituted one. Shortly after this call, Delta allegedly instituted a baggage handling fee and AirTran followed.[18]

The plaintiffs claimed that the analyst call had facilitated the agreement to set fees.[19] Other recent complaints have also quoted statements from analyst calls to support an assertion that competitors were signaling through these calls. [20]

Implied Preclusion of Claims

The use of investor and analyst conference calls to support antitrust claims creates a tension between SEC regulations, which encourage the free flow of material information to investors, and the antitrust laws, which punish companies that invite collusion or reach agreement with competitors through public statements.

> The use of investor and analyst conference calls to support antitrust claims creates a **tension** between SEC regulations, which **encourage** the free **flow** of **material information** to investors, and the antitrust laws.

Years ago, FTC Commissioner Orson Swindle recognized this tension, expressing that an FTC invitation to collude consent "may deter corporate officials from making useful public statements (e.g., in speeches to investors or presentations to securities analysts) that candidly address industry conditions, individual firms' financial situations, and other important subjects."[21]

Where there are conflicts between the antitrust and securities laws, courts will find that the securities laws implicitly preclude application of the antitrust laws. The Supreme Court most recently explained this relationship in *Credit Suisse v. Billing*,[22] holding that there can be no antitrust liability where application of the antitrust laws is "clearly incompatible" with the securities laws in that particular context.

In *Billing*, the Court identified a four-factor test to assess whether the conduct should be immunized.[23] Each of these factors can be applied in the context of analyst and investor conference calls.

Factor 1: An Area of Conduct Squarely Within the Heartland of Securities Regulations. Executives' participation in public investor and analyst calls likely is an activity that falls within the heartland of securities regulations. Regulation FD expressly encourages companies to disclose material business information in a way that ensures that the entire public, including business competitors, has simultaneous and non-discriminatory access to that information.

Factor 2: Clear and Adequate SEC Authority to Regulate. The SEC has extensive authority to supervise and regulate disclosures by public companies and has promulgated extensive rules that govern how and when public companies communicate with the public and others.

In addition to promulgating Regulation FD to address the issue of selective disclosures, the SEC has repeatedly strengthened the disclosure provisions of the 1934 Act, most notably in recent years under the authority of the Sarbanes-Oxley Act, which among other things requires public companies to establish procedures to capture and process information that must be publicly disclosed.[24]

Factor 3: Active and Ongoing SEC Regulation. The SEC actively regulates disclosures by public companies under the comprehensive scheme of disclosure regulations detailed above, including the many recent amendments. Public companies fail to make full disclosure of material information at their peril.

Section 10(b) of the 1934 Act and SEC Rule 10b-5 require public companies to speak fully and truthfully when making statements to the investing public. Furthermore, companies listed on self-regulatory exchanges, such as the New York Stock Exchange (NYSE), must comply with the disclosure obligations imposed by those exchanges.[25] The SEC oversees and actively supervises the NYSE and other self-regulatory exchanges.

Factor 4: Serious Conflict Between the Antitrust and Regulatory Regimes. The Supreme Court in *Billing* explained that antitrust enforcement is inappropriate where the conduct at issue is supervised by the SEC and applying both and antitrust and securities laws would risk "conflicting guidance, requirements, duties, privileges, or standards of conduct."[26]

Where antitrust and securities law regulate the same conduct, "antitrust courts are likely to make unusually serious mistakes."[27] This risk is particularly high where "evidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical."[28]

Antitrust suits based on statements made in investor and analyst conference calls could create these risks. An antitrust suit would subject public companies to conflicting advice from securities lawyers (who urge disclosure of material business plans and strategies) and antitrust lawyers (who would counsel against such disclosure).

As a result, companies fearful of antitrust attack might hold back on making prompt and truthful disclosures, especially when the disclosures relate to competitively sensitive information. However, this information may well be material under the securities laws.[29]

There is a fine line between permissible, and often required, disclosure and impermissible collusive signaling of competitors. The SEC has

never authorized companies to send signals to their competitors through statements to investors and analysts. However, the SEC did not authorize many of the practices challenged in *Billing*, and yet the Court held that the agency's supervision was enough to oust antitrust enforcement.[30]

A "serious conflict" between the securities and antitrust laws does not mean that the securities laws squarely permit what the antitrust laws forbid (or vice-versa); indeed, the heart of the conflict in both *Billing* and the public disclosure context is the uncertainty, the "fine, complex, detailed line," between conduct the SEC encourages or mandates (material business disclosures) and conduct potentially open to attack under antitrust law (signals to competitors).[31]

So long as the SEC engages in "administrative oversight" of the conduct at issue, and in particular where antitrust litigation would create a "substantial danger that companies would be subjected to duplicative and inconsistent standards," the implied preclusion doctrine prevents antitrust claims from proceeding.[32]

But There Are Limits

There are logical limits to the application of implied preclusion to statements made during investor and analyst conference calls.

For instance, if Robert Crandall had simply made the challenged statement, "Raise your goddamn fares 20 percent. I'll raise mine the next morning… You'll make more money and I will too," to his competitor in the course of an earnings call, there would be little danger of a conflict between the securities and antitrust regimes. Statements that are "uniquely unequivocal" and "not ambiguous" represent the easy case.[33]

The key issue will be the justification: It is reasonable to immunize any statement made in the context of an investors' conference call where there is a legitimate business justification other than collusion. This is consistent with the FTC's suggestion in *Valassis* that there should be enforcement involving earnings calls only in those "limited circumstances" where there is no justification for the offending statement other than collusion.[34]

Guidelines to Minimize Risk

Even though there are good defenses to suits based on statements made during investor and analyst calls, it is best not to be the test case. Here are a few tips to help avoid the antitrust traps in public analyst and investor conference calls:

• Know the danger zones. In general, the highest risk statements are those that discuss future prices or output levels.

• Be only as specific as you need to be. Many times, it will be possible to provide the necessary information to the investing public without providing too much in the way of details to competitors. For example, if information about prices, output or costs is aggregated, the antitrust risk can be reduced.

• Focus on your own company. Don't try to speak for "the market" or "the industry." Avoid statements such as, "The industry as a whole needs to be more disciplined in pricing." Justify price increases based on the company's own costs, capacity and customer demand, not those of "the industry." Don't discuss the effect of competitive decisions, such as reductions in capacity, on prices, competitors or market conditions.

• Be definitive in explaining future actions. It is unwise to announce conditional market strategies based on the actions of a company's competitors.

• Some things are better left unsaid. The best course is to avoid speculating about how competitors or the market may react.

For example, it would be best to avoid discussions about whether a potential price increase will stick, or what the company might do if a competitor does or does not respond to the company's actions. If asked: "Are you going to take a price increase after Labor Day and by how much?" the best answer may be: "I cannot comment on specific price decisions before they are announced to our customers but we will take whatever steps are necessary to assure both our competitiveness and our profitability."

Aggressive scrutiny of public companies' investor and analyst conference calls by the plaintiffs' bar and government enforcers may be a fact of life. A little awareness will help companies avoid the antitrust traps.

1. E.g., Compliance Week, "Despite Slump, Cos. Not Abandoning Earnings Guidance" (May 22, 2009) (reporting that 60 percent of companies are providing period earnings guidance to investors), available at www.complianceweek.com/blog/aguilar/2009/05/22/despite-downturn-cos-not-abandoning-earnings-guidance/.
2. Joel F. Houston, Baruch Lev and Jennifer W. Tucker, "To Guide or Not to Guide? Causes and Consequences of Stopping Quarterly Earnings Guidance," available at http://www.niri.org/findinfo/Guidance/To-Guide-Or-Not-to-Guide-Causes-and-Consequences-of-Stopping-Quarterly-Earnings-Guidance-academic-.aspx.
3. Financial Relations Board, 2009 Earning Guidance Survey Executive Summary (76 percent of investment analysts believe that the stock market would penalize companies that suspend earnings guidance in this environment), available at www.financial relationsboard.com.
4. Richard H. Walker, Director, Division of Enforcement, U.S. Securities & Exchange Commission, "Regulation FD—An Enforcement Perspective," Before the Compliance & Legal Division of the Securities Industry Association (Nov. 1, 2000), available at http://www.sec.gov/news/speech/spch415.htm.
5. 743 F.2d 1114 (5th Cir. 1984).
6. Id. at 1116.
7. See *In re MacDermid Inc.*, Docket No. C-3911 (F.T.C. Dec. 21, 1999); *In re Stone Container Corp.*, 125 F.T.C. 853, 854 (1998); *In re Precision Moulding Co. Inc.*, 122 F.T.C. 104, 105 (1996); *In re YKK (USA) Inc.*, 116 F.T.C. 628, 629 (1993); *In re AE Clevite*, 116 F.T.C. 389, 390 (1993); *In re Quality Trailer Prods. Corp.*, 115 F.T.C. 944, 945 (1992); *United States. v. Ames Sintering Company*, 927 F.2d 232, 233-34 (6th Cir. 1990) .
8. File No. 051 0008 (F.T.C. March 14, 2006).
9. *In re Valassis Communications. Inc.,* File No. 051 0008 (F.T.C. March 14, 2006) (Compl. Ex. A at 4), available at http://www.ftc.gov/os/caselist/0510008/060314cmpexha0510008.pdf.
10. *In re Valassis Communications Inc.*, Analysis of Agreement Containing Consent Order to Aid Public Comment, 71 Fed. Reg. 13976, 13979 n. 11 (March 20, 2006).
11. Id. at 13978-79.
12. 15 U.S.C. 1.
13. *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004); *Blomkest Fertilizer Inc. v. Potash Corp.*, 203 F.3d 1028, 1032 (8th Cir. 2000) (en banc).
14. *Conley v. Gibson*, 355 U.S. 41, 45 (1957) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").
15. 550 U.S. 544 (2007).
16. 129 S. Ct. 1937, 1950 (2009).
17. No. 1:09-cv-1391 (N.D. Ga. Filed May 22, 2009).
18. Compl. ¶22.
19. Id.
20. *Pemiscot Memorial Hospital v. CSL Limited*, No. 2:09-cv-03143 (E.D. Pa. Filed July 15, 2009); *In re Potash Antitrust Litig. II*, Direct Purchaser Amended Consolidated Class Action Complaint, MDL Docket No. 1996, Civil No. 1:08-cv-6910 ¶¶136-143 (N.D. Ill. Filed Apr. 3, 2009); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL Docket No. 1869, Misc. No. 07-489 (PLF) ¶¶4, 11, 68 (D.D.C. filed April 15, 2008).
21. *In re Stone Container Corp.*, 125 F.T.C. 853, 860 (1998) (dissenting statement of Commissioner Orson Swindle).
22. 551 U.S. 264, 285 (2007).
23. *Electronic Trading Group, LLC v. Banc of Am. Sec., LLC*, 588 F.3d 128 (2d Cir. 2009); see also *Mayfield v. Citigroup Inc.*, No. 08-cv-07747 (S.D.N.Y. Filed Jan. 26, 2010) (applying *Billing* to preclude application of antitrust laws against underwriters of auction rate securities ("ARS") for allegedly acting collectively to jointly withdraw support for the ARS market).
24. 15 U.S.C. §78m(l).
25. NYSE Listed Company Manual §202.05.
26. 551 U.S. at 275-76.
27. Id. at 282.
28. Id. at 281.
29. 17 C.F.R. §240.12b-2 (1984) (definition of "material" for purposes of the 1934 Act).
30. 551 U.S. at 279.
31. Id.
32. *United States v. NASD*, 422 U.S. 694, 734-35 (1975).
33. *United States v. American Airlines Inc.*, 743 F.2d 1114, 1119, 1122. (5th Cir. 1984).
34. 71 Fed. Reg. at 13979 n. 11.

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