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FTC OBTAINS UNPRECEDENTED ANTITRUST SETTLEMENT FOR ALLEGED "INVITATION TO COLLUDE" IN QUARTERLY ANALYST CONFERENCE CALL

Just last week, federal investigators were granted broad new powers to eavesdrop on private corporate communications for antitrust violations in amendments to the Patriot Act (*see AVH Legal Developments*, March 9, 2006), and, now, a recent case brought by the Federal Trade Commission makes clear that federal antitrust investigators also are listening to corporations' public statements to analysts and shareholders and are willing to prosecute companies for the implications of such statements – not necessarily for any violations of the securities laws but, rather, for violations of the antitrust laws.

On March 14, in *In re Valassis Communications, Inc.*, the Federal Trade Commission settled a case against Valassis Communications, for what it alleged was an invitation by Valassis to its only competitor in the market for free-standing newspaper inserts (FSIs) to collude in order to end an ongoing price war. According to Jeffrey Schmidt, Director of the FTC's Bureau of Competition: "The action taken by the Commission today demonstrates that the FTC will protect consumers by challenging, in appropriate circumstances, invitations to collude before the invitations are accepted and become agreements to fix prices or divide markets." While not entirely unheard of, the prosecution of cases charging such "attempted price fixing," are rare, and, the allegation here – attempted collusion via an analyst conference call – is wholly unprecedented and should trouble executives of publicly held companies.

FSIs are multi-page booklets found in newspapers containing discount coupons and the like for products sold by various companies. According to the FTC, only Valassis and News Americas compete in the market for FSIs. By 2004, a price war between the two firms had ensued and the prices of FSIs had plummeted. In July 2004, Valassis held a quarterly analyst conference call, open to the public via the telephone and the internet (and thus ostensibly to its competition), during which, the FTC alleged, Valassis "invited its direct competitor, News America, to join in a scheme to allocate FSI customers and fix FSI prices and thereby end an ongoing price war between the two companies."

The FTC alleged that Valassis' "invitation to collude" violated Section 5 of the FTC Act, which prohibits unfair methods of competition and which can reach conduct which may violate the spirit, if not the letter, of the Sherman Antitrust Act. In its complaint, the FTC set forth the particular statements made by Valassis' CEO "detailing the company's new strategy for increasing FSI prices." The strategy included: abandoning its 50 percent market share goal; aggressively defending its existing customer base and market share; submitting price bids at levels substantially above current market prices for current News America

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customers; and monitoring News America's response to its new business strategies. The CEO also stated that if News America competed for Valassis' customers and market share in the future, then the price war would resume.

According to the FTC, by those statements, Valassis not only proposed a return to pre-price war prices, but also proposed a deal to its direct and only competitor: Valassis would stop competing for News America's customers if News America stopped competing for Valassis' customers. The FTC and Valassis settled the matter by consent decree, which requires only that Valassis not do it again, nor actually enter into an agreement with News America to fix prices or divide markets. No admission of liability was made and no other conduct relief was ordered. Of course, violations of the Order will expose the company to civil penalties. The settlement is subject to a notice and comment period of 30 days before it can become effective.

This case is notable for a number of reasons. "Collusion" cases typically concern Section 1 of the Sherman Act, which requires an actual agreement among competitors – there is no provision for attempted price fixing, market division, or bid rigging. Mere "invitations to collude" do not meet this threshold agreement requirement and so Section 5 liability for such conduct represents an expansion of the prohibitions of the antitrust laws beyond conspiracies in restraint of trade.

However, this expansion of enforcement by the government likely will not be accompanied by a corresponding exposure to treble damage lawsuits by private parties. Because such conduct falls short of being a conspiracy and also is unlikely to have actually injured any potential plaintiff, private actions under Section 1 of the Sherman Act are unlikely for mere "invitations to collude." Of course, if an "invitation to collude" is accepted, either expressly or tacitly, then exposure to both government enforcement and private treble damage actions under Section 1, as well as government and private actions under similar state law, is likely.

That said, the Department of Justice has brought mail and wire fraud charges against parties who have unsuccessfully attempted to fix prices or divide markets. Additionally, as is evident from the *American Airlines* and *Microsoft* cases, such attempts can form the basis of a monopolization case. Nevertheless, the FTC has brought several cases in past years for such attempted violations under Section 5 of the FTC Act for violating the spirit of the antitrust laws. Importantly, however, those cases, along with the monopolization and wire fraud cases, in large measure concerned private invitations to collude. Although one prior case did involve some public statements, such statements were accompanied by a broad course of private communications and other conduct. Indeed, a former director of the Bureau of Competition remarked only a little over a decade ago that "there are considerations that argue for caution" in charging that a public statement be the basis of an antitrust violation.

The FTC's case against Valassis is thus wholly unprecedented and represents a departure from prior enforcement policy. What is clear, though, is that it is treacherous to simply rely on the disclosure policies of the securities laws as a shield from liability for anticompetitive communications. As such, it may behoove executives in concentrated industries to seek the advice of antitrust counsel – in addition to securities counsel – in preparing public statements which may concern competition, pricing, or markets.

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