FTC Settles Invitation-to-Collude Charges Against U-Haul Under Section 5 of the FTC Act

On June 9, 2010, the Federal Trade Commission settled charges regarding an invitation-to-collude case — a genre of case that does not arise very often, but that does provide a cautionary reminder. The FTC charged that U-Haul International, Inc. ("U-Haul"), had attempted to collude on one-way truck rental prices in a complaint alleging that, between 2006 and 2008, U-Haul engaged in unfair methods of competition in violation of Section 5 of the FTC Act by inviting rivals Avis Budget Group, Inc. ("Avis Budget") and Penske Corporation ("Penske") to enter into a conspiracy to raise prices. The agency found no agreement; its allegations relate only to statements made by U-Haul's CEO during an earnings call and to his admonitions to U-Haul managers and dealers.

To settle the complaint, U-Haul and its parent company, AMERCO, have agreed to an FTC Order, which will remain in effect for 20 years. The order includes both cease and desist provisions enjoining the companies from colluding or inviting collusion as well as compliance monitoring and reporting requirements to ensure that U-Haul and AMERCO comply with its terms. The FTC will accept public comment on the Order for 30 days, until July 9, 2010, after which the agency will decide whether to finalize it.

According to the FTC, U-Haul's attempt to collude included both private communications about pricing between U-Haul personnel and its competitors, as well as public pronouncements by U-Haul intended to facilitate collusion and raise prices.

- The FTC alleges that U-Haul's CEO employed a public communication strategy inviting collusion during U-Haul's third quarter 2008 earnings conference call. According to the complaint issued by the agency, the CEO recognized that competitors would monitor his earnings call, and during his statements and answers to questions, he communicated U-Haul's intentions about leading prices upward. Specifically, he announced U-Haul's efforts "to show price leadership" even in "highly competitive" markets and explained that his company would refrain from cutting prices immediately in response to competition in order to convince their competitors that they need not "throw the money away" by cutting prices — that "[i]f they cave on prices the net effect is we got less money."
- Prior to this call, and beginning in 2006, U-Haul's CEO directed his company's regional managers and dealers to raise one-way rental prices, and then to speak privately with their competitors Avis Budget and Penske, to make certain that their competitors knew about U-Haul's price increase. During these conversations, they were to encourage the competitors to follow U-Haul's lead, and to make sure the competitors understood that, if U-Haul's price leadership were not followed, U-Haul would return its rates to original levels.
- In circumstances where U-Haul managers or dealers believed its price leadership strategy would not be successful, the CEO instructed regional managers and dealers to lower one-way rates below competitors' prices, and then to inform the competitor of the reduction. According to the complaint, U-Haul believed this would "teach" the competitor "that its low-price policy was fated to be ineffective" and would "prepare the ground for the future implementation by U-Haul of the basic, collusive strategy."

Invitation-to-collude charges are relatively rare, but this case serves as a reminder of the need to be cautious in statements during earnings calls, as well as in direct conversations with competitors. Although U-Haul's conduct included both private and public invitations to collude, it is certainly possible the FTC would have filed its complaint based on the earnings calls statements alone. The FTC leadership under the Obama Administration has repeatedly stated that it is seeking test cases to demonstrate that Section 5 of the FTC Act has a broader reach than the Sherman Act, and this case demonstrates the intention to hold companies accountable even on grounds that would not rise to the level of a traditional antitrust violation.

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