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THE OPPORTUNITIES AND RISKS POSED BY SOCIAL MEDIA FOR ANTITRUST COMPLIANCE

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I. INTRODUCTION: CORPORATE ANTITRUST AND COMPETITION COMPLIANCE PROGRAMS NEED TO PROVIDE GUIDANCE REGARDING THE USE OF SOCIAL MEDIA

The growth of new forms of social media is creating new opportunities—and risks—for businesses that existing corporate antitrust and competition law compliance policies may not address.

Social networks, platforms, or applications such as Facebook, Twitter, and Tumblr provide just a few examples. According to a survey conducted by Forrester Research last year of more than 150 companies that monitor social media, more than 82 percent said they use data from social media sites for competitive intelligence, the single most cited reason for monitoring.[1]

Competitors have always monitored each other's public advertising and communications. The quantity and quality of information available via social media,

[1] Douglas MacMillan, *Hewlett-Packard Shows Hazard of Sharing LinkedIn Profiles*, Bloomberg Sept. 20, 2011, http://www.bloomberg.com/news/print/2011-09-20/hewlett-packard-executive-proves-hazard-of-sharing-linkedin-profiles-tech.html.

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however, can often go well beyond what is contained in a carefully reviewed press release or other form of public disclosure. Perhaps fostered by a combination of false-anonymity and informality, employees may publicly ''post'' business information via social media that the company would never have issued otherwise.

For example, there is a recent report where the identity of the potential acquisition target in a non-public transaction was leaked (inadvertently) to the buyer's competitor.[2] An investigation revealed that a member of the buyer's merger and acquisition team posted a series of social media messages about doing diligence on a company in a specific city, enabling potential discovery of the identity of the target.[3] Indeed, there are firms that offer tools that systematically detect competitive intelligence on the Internet for the purpose of providing their clients with a window into what is happening in that client's industry.[4]

In-house counsel and compliance practitioners recognize that the use of new forms of social media by businesses has the potential to raise a multitude of legal and compliance risks. This article specifically addresses the need for antitrust and competition law compliance programs to provide guidance on how to use social media to compete more effectively without incurring undue risks.[5]

II. ANTITRUST AND COMPETITION LAWS APPLY TO BUSINESS USES OF SOCIAL MEDIA

Antitrust and competition laws apply to all forms of business conduct, regardless of how novel they may be. While social media creates more opportunities for informal communications generally, the participants do not control what happens to those communications after they have been posted.[6] Further, because ''social media use is so commonplace, it is easy to become complacent when using the platforms.''[7]

A. New Social Media Do Not Change The Substance Of Antitrust And Competition Law

Courts addressing antitrust claims involving novel technologies have sometimes paid additional care to conduct regarding such technologies. This consideration typically focuses on the standard of review, while seeking to avoid an undue risk of enforcement error and deterring welfare-enhancing innovation.[8] Courts have not suggested, however, that conduct involving novel technologies is subject to different substantive limits under antitrust or other competition laws.

For example, in *Microsoft*, the D.C. Circuit court expressed concern about applying *per se* treatment to a claim of tying where the tied good was ''physically and technologically integrated with the tying good.''[9] The D.C. Circuit concluded that it did ''not have enough empirical evidence regarding the effect of Microsoft's practice on the amount of consumer surplus created or consumer choice foreclosed by the integration of added functionality into platform software to exercise sensible judgment regarding that entire class of behavior.''[10] Indeed, the court further concluded that ''the nature of the platform software market affirmatively suggests that *per se* rules might stunt valuable innovation.''[11] The D.C. Circuit therefore vacated the district court's finding of *per se* tying liability under Section 1 of the Sherman Act, but stated that ''Plaintiffs may on remand pursue their tying claim under the rule of reason.''[12]

Plaintiffs have already brought cases alleging violations of competition laws, including, in particular, claims of false advertising, based on alleged misuse of social media. As of the time of this article, the authors have been unable to find any cases that claim antitrust violations squarely based on alleged misuse of new forms of social media like those discussed herein.[13] It would appear, however, to be a matter of time before antitrust cases are brought based on alleged misuse of social media.

1. Key Antitrust Risks

Generally, antitrust and competition laws governing business conduct apply to participation in social media without exception, regardless of whether that conduct is considered traditional or novel.[14] In practice, the antitrust law that likely presents the most important consideration for a typical business is Section 1 of the Sherman Act and its State law equivalents.

Section 1 bars agreements that restrain trade unreasonably.[15] For Section 1 to apply there must be an agreement between two (or more) independent economic actors and to have an ''agreement'' those actors must have ''had a conscious commitment to a common scheme designed to achieve an unlawful objective.''[16] Plaintiffs often have difficulty alleging facts that a court will deem sufficient to ''plausibly'' allege that an agreement exists and that an antitrust violation has occurred.[17] Plaintiffs can be expected to search for, identify, and cite uses of social media that suggest that two or more firms have agreed to coordinate competitive conduct.

The test as to whether an agreement restrains trade unreasonably turns on the circumstances. Most agreements are analyzed under the rule of reason to assess

[2] *See id.*
[3] *Id.*
[4] *See*, *e.g.*, *id.*
[5] For purposes of this article, ''competition law'' is used as a shorthand reference to laws that prohibit unfair and deceptive trade practices, including those aspects of advertising law that bear on competition.
[6] Online and Social Media Division, U.S. Army, The United States Army Social Media Handbook 20-21 (2011), http://www.slideshare.net/USArmySocialMedia/social-media-handbook-2011-8992055.
[7] *Id.* at 4.
[8] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 89-90 (D.C. Cir. 2001).
[9] *Id.* at 90.
[10] *Id.* at 94.
[11] *Id.* at 92.
[12] *Id.* at 84.
[13] Last search date May 10, 2012.
[14] By way of reference, the primary antitrust laws to which we refer include federal and State laws in the United States. We do not address the EU or other jurisdictions, although it is possible that some jurisdictions may treat new forms of social media differently than traditional forms of social media.
[15] 15 U.S.C. § 1.
[16] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984) (regarding alleged vertical agreement); and *see* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (applying *Monsanto* standard to alleged horizontal agreement).
[17] *See*, *e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

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whether they have, in fact, caused marketwide injury. However, certain types of agreements such as horizontal price-fixing and customer allocation are deemed anticompetitive *per se* under Section 1 of the Sherman Act.[18] New social media potentially could be used to make, implement, and monitor such unlawful agreements.

In addition, firms that enjoy high market shares and/or other attributes of potential market power need to consider employee participation in social media as creating another form of risk. For example, if employees use social media in a way that suggests that a firm is seeking to exclude or injure its rivals based on something other than competition on the merits, the trail of that activity could raise the risk of investigation or litigation by itself, or it could be cited as evidence to support a claim of monopolization under Section 2 of the Sherman Act based on other facts.

Antitrust enforcement actions can be brought by government agencies, including the U.S. Department of Justice, the Federal Trade Commission (''FTC''), and State Attorneys General, as well as private plaintiffs, depending on the circumstances.[19]

2. Other Key Competition Law And Regulatory Risks

In addition to the antitrust laws, as noted above, business conduct is subject to federal and State laws that prohibit other types of unfair competition, including, in particular, false advertising. The basic consumer protection statute enforced by the FTC is Section 5(a) of the FTC Act, which provides that ''unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful.''[20] Similarly, there are a variety of State laws including so-called baby FTC Acts and other laws that govern unfair or deceptive trade practices, many of which provide for private rights of action. Social media conduct also may be alleged to violate the false advertising and product disparagement prong of Section 43(a) of the Lanham Act.[21]

For example, in *Doctor's Assocs., Inc. v. QIP Holder, LLC*,[22] the plaintiffs sought injunctive relief and damages based on claims of false and deceptive advertising in violation of Section 43(a) of the Lanham Act, along with Connecticut law claims for commercial disparagement and violation of the Connecticut Unfair Trade Practice Act.[23] An important aspect of the conduct challenged in *Doctor's Assocs.* involved allegedly false video ''commercials'' that the defendant made available on an Internet site that it sponsored as part of an advertising campaign comparing certain Quiznos sandwiches to certain Subway sandwiches.[24] The court rejected the defendants' argument that the Internet videos were not ''commercial advertising or promotion'' under the Lanham Act.[25]

In *QVC, Inc. v. Your Vitamins, Inc.*,[26] the district court did not take a position ''whether blog posts should be deemed relevant and credible evidence'' of consumer confusion in the context of a false advertising claim. The court, however, stated, albeit in dicta, that ''[b]log posts such as those in the case may be more reliable than broad-based surveys, insofar as they represent direct feedback from consumers specifically interested in the product(s) at issue, although concerns regarding such posts' authenticity are not ill-founded.''[27] The court noted that courts have reached differing conclusions on this issue.[28]

In addition, regulatory agencies have expressed interest in regulating social media conduct, and this enforcement activity can be expected to increase. For example, on November 21, 2011, the U.S. Department of Transportation entered into a consent order concerning, in part, Twitter advertising by Spirit Airlines, Inc.[29] The consent order states that ''print and Twitter advertisements by [Spirit] violated the advertising requirements specified in 14 CFR 399.84, as well as 49 U.S.C. § 41712, which prohibits unfair and deceptive practices.''[30] The consent was based, in part on ''[a] review of Spirit's Twitter feed [that] disclosed additional instances where Spirit failed to comply with the Department's full-fare advertising rule and case precedent.''[31] The order directed Spirit to cease and desist from future violations and assessed the carrier a compromise penalty of $50,000.[32]

B. New Social Media Raise New Opportunities For Antitrust Risk

We present two hypothetical examples of how businesses may face new, or at least heightened, risks in the new environments created by the ever-growing forms of social media.

1. Antitrust Risk Created By Hypothetical Blogging

Facts: Several leading suppliers of high-end golf equipment independently instruct their employees to monitor industry-related blogs. Some of these representatives begin posting comments in response to postings by others. The representative of Company A posts that ''everyone knows prices of clubs should rise by at least 10 percent for the next model year to cover increased

[18] *See*, *e.g.*, Arizona v. Maricopa Cnty Med. Soc'y, 457 U.S. 332, 345-47 (1982); Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50 (1990) (per curiam).

[19] 15 U.S.C. § 2. The Federal Trade Commission (''FTC'') enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits, *inter alia*, ''unfair methods of competition.'' This prohibition includes any conduct that would violate Section 1 or 2 of the Sherman Antitrust Act. *See*, *e.g.*, FTC v. Motion Picture Adver. Serv. Co., 344 U.S. 392, 394-95 (1953).

[20] 15 U.S.C. § 45(a)(1); and *see* Federal Trade Commission, Bureau of Consumer Protection, *Online Advertising and Marketing Legal Resources*, http://business.ftc.gov/advertising-and-marketing/online-advertising-and-marketing.

[21] 15 U.S.C. § 1125(a).

[22] Doctor's Assocs., Inc. v. QIP Holder, LLC , No. 3:06-cv-1710 (VLB), 2010 BL 50672, Apr. (D. Conn. Feb. 19, 2010).

[23] *Id.* at *1.

[24] *Id.* at *1-2.

[25] *Id.*at *22.

[26] QVC, Inc. v. Your Vitamins, Inc., 714 F.Supp.2d 291, 302 n.19 (D. Del. 2010), *aff'd*, QVC, Inc. v. Your Vitamins Inc., 439 F. App'x 165,168 (3d Cir. 2011) (not selected for publication in the Federal Reporter) characterizing blog posts as evidence that ''will often be of only limited value.''

[27] *QVC*, 714 F.Supp.2d at 302 n.19.

[28] *Id.*

[29] Consent Order, Spirit Airlines, Inc., U.S. Dep't of Transportation (''DOT'') Office of the Sec'y, Docket OST 2011-0003 (Nov. 21, 2011).

[30] *Id.* at 1.

[31] *Id.* at 3.

[32] *Id.* at 1.

costs.'' The next day, the representative of Company B posts the following, ''10 percent is too high, but I think 5 percent might work.''

Questions: Whether this exchange raises significant antitrust risks depends on many variables, but recent cases such as *Delta/Air Tran* and *U-Haul* provide examples of ''signaling'' claims that might be echoed by a potential plaintiff under these facts.[33] Here are some questions to consider. Do the two postings constitute an agreement? If so, what is the agreement? Does that answer change if A raises prices by 10 percent and B by 5 percent? If Company C is monitoring the blog, but does not post, is it a party to an agreement by merely monitoring? Does the answer change if Company C raises its prices following similar behavior by Companies A and B?

2. Competition Law Risks Created By Hypothetical Tweeting

Facts: Employees at a small cosmetics company called IndyCo start tweeting the claim that a leading dermatological product, ''The Acne Zapper,'' which is marketed by a major consumer products company, can cause scarring. The tweets are based on secondhand reports that some IndyCo employees have seen on blog postings by various individuals, although their provenance is not known. The tweets are picked up by various sources and the substance of the concern becomes widely known via the Internet. Sales of The Acne Zapper drop by 30 percent during the quarter that the tweets by IndyCo employees become well-known.

Questions: Can IndyCo be sued by the FTC for violating Section 5 of the FTC Act, or by a State Attorney General or private plaintiff under State laws that bar unfair or deceptive trade practices? Does it matter that the source of the claim tweeted by IndyCo employees is in the public domain? Are the tweets ''commercial advertising or promotion,'' and if so are they subject to claims of false advertising under the Lanham Act?

III. Antitrust Compliance Programs and Social Media

The examples noted above are rapidly becoming more realistic as both public and private sector organizations continue to use social media in new and innovative market-facing ways. As a result, companies are striving to meet the challenge of managing risks, including those involving antitrust or competition laws and regulations that might result from such use. The degree of difficulty only increases where businesses (and their employees) either do not have or do not adhere to a well-thought-out strategy for the use of social media, networking and other online venues for promoting their products or services.

With this backdrop in mind, corporate functions such as Legal, Compliance, Risk Management, Internal Audit and Human Resources may all have a role in establishing controls to mitigate problems that may emerge from company use of social media. These functions may work with Corporate Communications, Public Relations and/or the Sales or Marketing units (which typically, along with and at the direction of senior management, are involved in setting overall corporate strategy and protocol for company use of social media platforms), and IT, which has a role in formulating and implementing limits on technology use by granting or restricting access to certain software and sites.

Internal controls relating to social media generally recognize two equally important but not completely distinct pathways: the use of social media in an official capacity (*e.g.*, by an employee specifically designated to promote the business) and personal use of these websites, applications, and services by employees, either during regular office hours or on personal time. Capturing this distinction, and identifying and circumscribing the competitive risks as discussed above, is generally accomplished in three ways: policies and guidance, awareness and training, and monitoring.

A. Policies And Guidance

The size and breadth of the company are major determinants of the type of policy needed to control social media risks. Before embarking on the development of such a policy, an assessment of the risks is typically conducted; for the United States, this would typically focus on the Sherman Act and, where applicable, State laws and regulations, both described above in Section II.

The results of a compliance or operational risk assessment may identify general areas of antitrust concern for the company. Specific scenarios of social media use may help clarify the landscape and the inherent dangers. For example, many companies now use Facebook to promote or outwardly advertise particular products; designated company representatives (perhaps in the Marketing function) may ''post'' updates, reviews, or news articles on the company or products' Facebook page. If that posting contains information about entering a particular market or pricing the product a certain way, conceivably this could implicate antitrust laws and regulations if a competitor views these postings and decides to act similarly in the marketplace. The analysis for this type of potential ''signaling'' is explored in greater detail in Section II, but this example highlights the need for affected employees to understand the danger zones and where to go for help.

So where do you embed such guidance? Many organizations are still debating whether to develop and implement a standalone social media policy; some are incorporating specific rules on the use of these vehicles in their codes of conduct, subject-matter-specific compliance policies, risk protocols, and IT policies. With respect to antitrust, most companies have competition or antitrust compliance policies, protocols, or guidance documents in place. Therefore, adding a section on social media usage and price-fixing to a company's Antitrust Frequently Asked Questions (FAQs) may better clarify these risks than a generic statement in a social media policy.

Other companies, aware of the multi-layered approvals needed to create and/or revise a corporate policy, are issuing social media ''guidelines'' that can be amended or revised as needed given rapidly evolving tools and technologies. For example, Nordstrom's Social Networking Guidelines address competition risks directly; under the ''Confidential Information'' section, the guidelines urge employees not to share ''numbers and other sales figures (non-public financial or opera-

[33] *See* William H. Rooney et al., *Lessons From Delta/AirTran and U-Haul: Charting Your Own Course And Exercising Discretion Avoids Antitrust Trouble*, The Antitrust Counselor, Jan. 2011.

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tional information), strategies and forecasts, legal issues or future promotions/activities'' and not to ''post any merchandise pricing information or comparisons.''[34] Other companies emphasize restrictions on the sharing of proprietary or other information that could pose risks if shared publicly.

Another factor that must be considered is the breadth and scope of the policy or guidance itself. Following several cases involving complaints brought by unionized workers against their employers for overly restrictive workplace social media policies, the National Labor Relations Board (NLRB) issued guidance on the appropriateness of such policies. Specifically, the Board noted that, in some cases, it had found policies were overly broad when they targeted protected ''concerted'' activity, or activity that might involve employee discussions about workplace conditions.[35] The Board specifically pointed out, however, that employee remarks about specific managers (including offensive ''tweets'') were not considered protected. Still, these cases point to the fact that there are both legal and regulatory limitations on social media policies, and that those responsible for creating those policies should consult counsel during their development.

B. Awareness And Training

Compliance programs, including policies and protocols, mostly focus on driving awareness of social media usage, including its perils and pitfalls. Companies are just now attempting to harness what *Forbes* described as ''social power''[36]—empowered individuals using new technologies, including social media, to organize and express themselves. In a business context, these individuals include employees, customers, and even vendors or suppliers. As a result, the message regarding compliance with social media policies should be appropriately tailored to the social media activity in the marketplace, cubicles and boardrooms. For example, planning awareness programs for an electronics retailer with a younger employee population could include short video vignettes that could be played in staff meetings, posters displayed in staff rooms, and other approaches that would capture these employees' attention while working in the store.

Traditional education or training programs are in the nascent stages; compliance training vendors are just beginning to offer ''off-the-shelf'' courses on social media, as they have previously focused on e-mail, blogging, and Internet use. Many companies have instead opted to create short, customized training vignettes or videos, the production of which may be led by the Corporate Communications or Marketing group using nontraditional vendors who specialize in social media matters.

Given that these programs are relatively new, awareness and training programs that focus on specific antitrust or competitive risk factors emanating from social media use are rare. More commonly, themes and messages may generically reference topics such as exercising due care in sharing competitive information, communicating directly or indirectly with competitors, and engaging in activities that may implicate unfair trade practice laws and regulations. As the case law and regulatory frameworks evolve to deal more succinctly on these issues, many of these formal program elements will likely follow.

C. Monitoring

As social media use has exploded, companies that have been more permissive in their use (as a promotional tool and also by employees using sites or applications for personal use) have turned to technologies and consultants that specialize in monitoring, tracking, and, in some cases, recording social media use. In the financial services sector, guidance issued by the Financial Industry Regulatory Authority (FINRA) has focused on the principles of retention of social media messages (specifically, those it considers a form of communication in support of a firm's business), supervision of employees using social media for such a purpose, and the use of links to third-party sites.[37] As to the last element, FINRA noted that firms should not include such a link if there are red flags that indicate ''false or misleading content.'' This offers a potential parallel to content that might be considered anti-competitive, such as sharing links to competitor's websites, blogs, or posts. As a result of this regulatory interest, as well as litigation spawned by social media use, there is a burgeoning industry of monitoring technology, which is now being extended to the world of smartphones and other personal devices.[38]

There are many challenges confronting implementation of such a monitoring program. In today's environment of expense controls and limited budgets, Corporate IT and Risk departments are particularly sensitive to new spending. Creating in-house monitoring technology or tools diverts resources from other tasks, such as upkeep and upgrades of existing systems. Yet, to achieve full compliance with newly issued policies and guidelines on social media use, some form of monitoring is needed to determine the effectiveness of these policies and guidelines, and even the compliance program as a whole.

IV. Outlook

Given the scant nature of legal and regulatory guidance on the topic of social media usage, it is evident that the use of social media in the corporate setting is outstripping rules and standards making from both internal and external sources. Playing this type of ''catch-up'' poses challenges to any organization, and the potential for these applications and technologies to create antitrust and competition law risks presents additional considerations.

While social media continues to evolve, lessons can already be drawn from recent antitrust litigation under

[34] Social Networking Guidelines, Nordstrom, http://shop.nordstrom.com/c/social-networking-guidelines.

[35] Lafe E. Solomon, Acting General Counsel, NLRB, Report of Acting General Counsel on Social Media Cases (2011).

[36] *See* David Kirkpatrick, *Social Power and the Coming Corporate Revolution: Why Employees and Customers Will be Calling the Shots*, Forbes, Sept. 26, 2011.

[37] FINRA, Regulatory Notice 11-39: Social Media Websites and Use of Personal Devices for Business Communication (2011), http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.pdf.

[38] According to the Questions and Answers section of the FINRA notice, persons associated with a firm can use personal communication devices such as smartphones or tablet computers for business communications such as the use of social media; however, these communications should run through a separately identifiable application to ensure potential retrieval.

way in combination with the guidance/reporting already put forth by regulatory agencies. Antitrust enforcers may very well use the analysis of the *Delta/Air Tran* and *U-Haul* cases in the near future and allege a pattern of signaling based on two competitors' descriptive Twitter feeds or blog posts. New developments are likely to produce cases and case law that flesh out scenarios of competitors exchanging proprietary and confidential information, discussing markets and products, and perhaps even moving into the mergers and acquisitions space, all through social networks. As more powerful tools that aggregate ''feeds'' or ''streams'' of social media become available, it will be even easier for companies and their employees to engage in collusive behavior, all the while making a public record of this activity available to customers and regulators alike.

Businesses should address these challenges proactively by using tools that are appropriate and by adapting to meet changing circumstances. Regulatory activity such as that involving the NLRB could trigger additional levels of inquiry at other agencies, beyond the initial focus on employment considerations. For the in-house lawyer or compliance officer, the ongoing analysis of business strategy and corporate culture will continue to guide the future path of social media policies and related compliance activity. Companies and those responsible for their internal controls and compliance will need to be both vigilant and creative in crafting their responses to the challenges presented by the growth of social media.

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