1. Introduction

1. This submission provides an overview of how the unilateral disclosure of information to competitors is evaluated under U.S. antitrust laws. i antitrus1.8 (t l)4.2a uni aus1.8re o910.2 U tnius1.8cr a aatiuno nsu(rm)18.6

rescind or revise it before it takes effect.[4] If the terms of agreement are complex (*e.g.*, specifying prices in numerous markets) but there is a common desire to reach agreement, cheap talk can help firms reach a collusive equilibrium.[5]

6. Under U.S. antitrust law, unilateral conduct, such as a unilateral disclosure of information, does not violate Section 1 of the Sherman Act, which prohibits a "contract, combination . . . or conspiracy" that unreasonably restrains trade.[6] This is because a unilateral act does not constitute the agreement required to create a violation of Section 1.[7] A unilateral disclosure of information may, in certain circumstances, violate Section 5 of the Federal Trade Commission Act ("FTC Act"), which prohibits "unfair methods of competition,"[8] or Section 2 of the Sherman Act, which prohibits efforts to "monopolize, or attempts to monopolize," including acts to "combine or conspire" with another person to monopolize.[9]

7. The remainder of this submission reviews how U.S. courts, and the U.S. Federal Trade Commission ("FTC") and the U.S. Department of Justice's Antitrust Division ("DOJ") (collectively, "the U.S. antitrust agencies"), have applied Section 5 of the FTC Act and Section 2 of the Sherman Act to the unilateral disclosure of information. In applying these laws, the U.S. antitrust agencies evaluate the legality of unilateral disclosures of information by considering such factors as the nature and quantity of information disclosed, the specificity and context of the information disclosure, the nature of the industry and the market involved, and whether there are procompetitive business justifications for the disclosure of information.

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4 Joseph Farrell & Matthew Rabin, *Cheap Talk*, 10 J. ECON. PERSP. 103 (Summer 1996).

5 Studies have shown such mechanisms have been effective in the airline industry. *See* William Gillespie, "Cheap Talk, Price Announcement, and Collusive Coordination," EAG 95-3, Discussion Paper, Economic Analysis Group, Antitrust Division, U.S. Department of Justice (Sept. 25, 1995); *see also* Severin Borenstein, *Rapid Price Communication and Coordination: The Airline Tariff Publishing Case*, *in* THE ANTITRUST REVOLUTION: ET

2. Antitrust Enforcement Actions Involving Unilateral Disclosures of Information

8. The U.S. antitrust agencies have pursued only a small number of antitrust cases involving unilateral information disclosures. This section summarizes the significant cases the agencies have brought. These cases have generally involved disclosure of information and other statements that, in light of the context and other facts, appeared to be invitations to collude. With the exception of the *American Airlines* case, none of these actions was litigated before a court. All of these cases resulted in settlement agreements without a judicial finding that the conduct violated the antitrust laws.

9. The *U-Haul International* case involved U-Haul, a company that rents trucks to individuals for moving household goods.[10] The company's profits were limited by aggressive competition in the market. The FTC alleged in its complaint that U-Haul had developed a strategy by which it would raise its rental rates and then call its competitors to disclose that it had made rate increases, encourage them to increase rates as well, and threaten to reduce its rates again if the competitors did not raise their rates. In addition, the FTC alleged that U-Haul had announced on an investor conference call that it recently had increased its rates and had encouraged its main competitor to do the same, while warning that it would drop its rates if its competitor did not match them within a specific period of time. The FTC alleged that these private and public disclosures created a significant risk of anticompetitive harm—because the proposals could have been accepted and, even if not formally accepted, they could have led to less aggressive competition—and thus violated Section 5 of the FTC Act. Accordingly, the FTC reached a consent decree with U-Haul that prohibited future efforts to use communications of this type to raise or stabilize prices or otherwise to coordinate with other companies on pricing.

10. The *Valassis Communications* matter involved an alleged invitation to collude from one publisher of newspaper advertising inserts to its only rival in that market.[11] The FTC alleged in a complaint that, during a public earnings conference call, the CEO of Valassis announced a new strategy for raising prices of inserts. The company knew that its rival, News America, would be monitoring the call. The FTC alleged that Valassis intended to facilitate collusion through its announcement. Moreover, it alleged that there was no legitimate business reason for Valassis to disclose its new pricing strategy. The FTC determined that if News America had accepted the invitation from Valassis, higher prices and reduced output of newspaper advertising inserts were likely to result, and that the conduct accordingly violated Section 5. Valassis entered into a consent order with the FTC that prohibits unilateral communications, both public and private, concerning the company's willin

its own inventory, while reducing production at its factories by a similar amount. In arranging for the purchases of linerboard, Stone Container executives communicated to their counterparts at the other companies that Stone Container would reduce its output and replace that production with its purchases from the competitors, and that it believed these actions would support price increases in the industry. In addition to these private statements, Stone Container used public statements and press releases to communicate its objectives. The FTC alleged that these acts and statements constituted an invitation by Stone Container to its competitors to join in a coordinated price increase, violating Section 5 of the FTC Act. Stone Container entered into a consent decree with the FTC that barred the company from future communications requesting or suggesting raising, fixing, or stabilizing prices.

12. In the *Precision Moulding* matter, the manager of the dominant manufacturer of certain art framing products asserted during a meeting with its competitor that the competitor's pricing was

competitor that they raise prices in sequence.[17] This case did not involve a unilateral price disclosure. The president of American Airlines contacted the president of its competitor, Braniff, to discuss the aggressive competition between the two airlines on a number of routes. The two airlines' combined market shares were between 60 and 90 percent on a number of non-stop routes from Dallas-Fort Worth, but they had been engaged in an aggressive price war. American's president proposed that Braniff raise fares by 20 percent, and promised that American would then raise its fares the next day by the same amount. Braniff's president demurred, and did not raise prices as proposed. American sought to dismiss the DOJ's complaint for failure to state a claim under the Sherman Act; the district court agreed and dismissed the complaint. On appeal, the court of appeals concluded that the elements of an attempted monopolization case under Section 2 had been met, because if Braniff had accepted American's offer, the two airlines together would have had monopoly power.[18] American subsequently entered into a consent decree that prevented the conduct from reoccurring, resolving the DOJ's competitive concerns.

17. Although unilateral conduct cannot violate section 1, as mentioned in paragraph 6 above, unilateral price disclosures can facilitate collusion among competitors, which may, in certain circumstances, violate section 1. In 1992, the DOJ sued eight of the largest U.S. airlines and the Airline Tariff Publishing Company ("ATP") for price fixing and for operating ATP, their jointly owned fare-exchange system, in a way that facilitated collusion in violation of Section 1 of the Sherman Act.[19] ATP was a complex system for the exchange of information among major airlines, which was widely and openly operated to disseminate fare information through computer reservation systems and travel agents. ATP provided a means for the airlines not only to disseminate fare information to the public but also for them to engage in essentially a private dialogue on fares. The airlines designed and operated ATP's computerized fare-exchange system so that they could (1) communicate more effectively with one another about future fare increases, restrictions, and elimination of discounted fares, (2) establish links between proposed fare changes in one or more city-pair markets and proposed changes in other city-pair markets, (3) monitor each other's changes, including changes in fares not available for sale, and (4) reduce uncertainty about each other's pricing intentions. ATP thus operated in "a manner that unnecessarily and unreasonably allowed [the airlines] to coordinate fares." The case was resolved with a judicial consent decree crafted to ensure that the airline defendants did not continue to use any fare dissemination system in a manner that unnecessarily facilitated price coordination or that enabled them to reach specific price-fixing agreements.

3. Criteria Considered in Assessing the Legality of Unilateral Information Disclosures

18. Although unilateral disclosure of information is generally not likely to harm competition, and can have procompetitive benefits, there are instances when it has the potential to create anticompetitive effects. The following are among the criteria that are relevant to determining whether a unilateral disclosure of information is likely to harm competition:

> *The nature and quantity of the information disclosed.* Disclosing extensive information regarding pricing, output, major costs, marketing strategies and new product development is more likely to have anticompetitive implications. In particular, disclosure of information about

17 743 F.2d 1114 (5th Cir. 1984).

18 *Id.*

future pricing generally has the greatest potential for anticompetitive harm because, if agreed to, a price-fixing agreement would result. Even in the absence of an agreement, disclosure of information about future pricing has a greater likelihood of promoting tacit collusion than disclosure of other information.

The specificity and context of the information disclosed. A disclosure expressing a willingness to raise prices by a specific amount (or similar information, such as a specific output reduction) creates a greater likelihood of anticompetitive harm than disclosure of less specific information. Thus, for example, a recipient of specific information can easily conform to a particular figure—such as the 20 percent price increase proposed by American Airlines or the price floor proposed in Quality Trailers. Similarly, Stone Container's statements regarding its output and inventory reductions provided competitors with specific information regarding the company's plans in the context of its attempt to raise industry prices. More generally, a disclosure containing terms of coordination has a greater likelihood of creating anticompetitive harm than one without such terms.

Whether the disclosure is public or private. Disclosure of information in a public setting may

4. Conclusion

19. Unilateral disclosure of information is often procompetitive and helps improve the functioning of markets. However, in certain circumstances such disclosures have the potential to be anticompetitive. U.S. courts and antitrust agencies evaluate whether such disclosures violate Section 5 of the FTC Act or Section 2 of the Sherman Act. Unilateral disclosures of information, however, do not, standing alone, violate Section 1 of the Sherman Act.

20. There have been relatively few fully litigated cases involving unilateral information disclosures, so that the precise contours of what is permissible and what may violate the antitrust laws in the United States are not completely clear. Some of the considerations the U.S. antitrust agencies may take into account are the nature of the information disclosed, including how specific it is, whether the information is disclosed broadly to the public or privately communicated only to competitors, whether the industry at issue is concentrated, and whether there are legitimate procompetitive reasons for the disclosures.