HUNTON & WILLIAMS

# Competitor Information Exchanges:

## Practical Considerations from FTC Consent Decrees[1]

By: Amanda L. Wait[2]

May 2011

[1] This paper was originally drafted as part of written materials in connection with the American Bar Association, Section of Antitrust Law's Competition and Consumer Protection Issues in the Energy Industry Conference, May 6, 2011.

[2] The Author was formerly a staff attorney in the Mergers III Division of the Bureau of Competition during some of the investigations mentioned in this paper. The views expressed herein are hers alone, are based on public information, and do not reflect the views of the Federal Trade Commission or any Commissioner.

Exchanging information with competitors is often part of the day-to-day business of many companies in the petroleum industry. A vertically-integrated pipeline operator, for example, must obtain information from its carriers with whom it may also compete. This information may include details about future shipment projections, names of customers, volumes purchased, and other competitively-sensitive information simply to ensure normal pipeline operation. Companies often join with competitors for the development of capitally-intense projects, such as the creation of a new plant or pipeline system.

Such cooperation among competitors almost inevitably involves the exchange of at least some information. If the information exchanged is competitively sensitive—that is, if it is information that a company would not normally share with its competitors in a competitive marketplace, such as pricing strategies, supplier or cost information, customer names and volumes, or other similar information—companies should establish appropriate firewalls or other safeguards to ensure that the companies remain appropriately competitive throughout their cooperation.

Recent FTC consent decrees, including those in the oil and gas industry, provide examples of the types of information exchanges among competitors that raise concerns of dampening competition. These decrees also provide guidance concerning the types of information safeguards that the Commission has required in order to maintain competition. This paper first outlines the relevant antitrust concerns associated with exchanges of competitively-sensitive information among competitors. Then, this paper discusses some of the information safeguards required by the Commission in recent petroleum industry consent decrees. It concludes with practical advice for establishing procedures to safeguard against the antitrust risks associated with information exchanges among competitors during the normal course of business in the petroleum industry.

## I. Antitrust Implications of Information Exchanges Among Competitors

A number of normal course of business activities can require the exchange of competitively-sensitive information among competitors. For example, a firm may be the sole supplier of a key input to its competitors. Although supplying that input to the firm's competitors can be procompetitive since it allows competitors that otherwise would not be able to participate to compete in the market, the vertically-integrated supplier may be in a position to learn about its competitors' capacity and production volumes and also may be positioned to raise costs to its competitors to dampen competition. Additionally, a firm may operate a processing plant, pipeline, or terminal to which its competitors need access in order to bring products to market. By providing market access to its competitors, the firm that owns the plant, pipeline, or terminal is facilitating competition. However, as with the prior example, the firm is also positioned to learn about its competitors' capacity and volume and, absent regulation to the contrary, could be in a position to raise its rivals' prices or seek out its competitors' customers based on this knowledge.

Many situations exist in which a firm in the petroleum industry may be positioned to receive competitively-sensitive business information about its competitors in the normal course of business. Although these exchanges are often procompetitive, firms must be aware of the possibility that such exchanges can pose antitrust risk.

A fundamental premise of antitrust law is that competitors should compete. Agreements among competitors to exchange information can constitute restraints of trade in violation of Section 1 of the Sherman Act,[3] particularly if the information exchanged is used to fix prices or otherwise harm competition.[4] Information exchanges could form the basis for an inference of an anticompetitive agreement even when no direct evidence exists.[5]

---

[3] 15 U.S.C. § 1.

[4] *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 93 (6th ed. 2007) (collecting cases).

[5] *See, e.g.*, United States v. Container Corp., 393 U.S. 333, 337 (1969) (asserting that exchange of price information in a highly concentrated industry involving a fungible product with inelastic demand would "chill[] the vigor of price competition"); *In re* Flat Glass Antitrust Litig., 385 F.3d at 368-69 (permitting inference of *per se* illegal agreement when: (1) exchange of pricing information was between upper hierarchy of glass producers; (2) several of defendants' documents emphasized that price increases were not economically justified or supportable but encouraged competitors to hold the line; (3) documents suggested "not just foreknowledge of a single competitor's pricing plans, but of the plans of multiple competitors"; and (4) predictions of price behavior were followed by actual price changes).

To determine whether an agreement unreasonably restrains competition and thereby violates the federal antitrust laws, courts traditionally have applied one of two analytical frameworks. Particularly egregious agreements among actual or potential competitors to fix prices, allocate markets, or otherwise coordinate key competitive actions generally are considered *per se* illegal under the antitrust laws. As such, they are condemned without a detailed, case-specific inquiry into their impact on competition. On the other hand, agreements that are not anticompetitive on their face or that have the potential to create procompetitive effects are considered under a "rule of reason" analysis that weighs an agreement's possible procompetitive and anticompetitive effects. Such procompetitive effects can include developing new products; bringing existing products to new markets; lowering prices; increasing the volume of products available for purchase by consumers; and lowering the cost of manufacturing, distribution, or sale.

**a. Avoiding *Per Se* Condemnation**

Certain types of collaboration among competitors are found to always or almost always raise prices or reduce output and are subject to *per se* analysis under the antitrust laws. Price fixing and agreements to restrict output are examples of *per se* illegal conduct that are viewed as anticompetitive without consideration of whether the specific arrangement at issue has procompetitive justifications. Price fixing includes agreements among competitors that set prices or affect price levels.

Competitor collaborations involving the exchange of competitively-sensitive information, particularly information relating to prices or output, may create opportunities for companies to enter into agreements that may be considered *per se* illegal under Section 1 of the Sherman Act. Even the appearance of collusion could prompt an investigation by the antitrust authorities. Violations of the Sherman Act can result in criminal fines and jail time, as well as enabling injured private parties (such as payers) to collect treble damages.

A plaintiff seeking to challenge a supply arrangement for a good or service between a vertically-integrated firm and its competitor, for example, may allege that the price discussions for the input between the competitors is a mechanism to signal a price for the downstream product for which they both compete, effectively setting prices. Similarly, if the input price is expressly related to the vertically-integrated producer's costs, this, too, could be alleged to be a mechanism by which the vertically-integrated firm and its competitor was setting prices. A plaintiff may also allege that the mechanism by which the vertically-integrated producer set the price to its competitors utilizes a formula by which all downstream competitors could then set prices to third parties.[6]

Further, because economics teaches that an agreement to limit output is tantamount to an agreement to fix prices, an exchange of information relating to production volumes, including purchases of inputs that directly correlate to production volumes, could be viewed as facilitating output restrictions among the downstream competitors.

As a practical matter, however, unless a supply agreement among competitors could be read to directly affect price or restrict output on its face, and in the absence of any other evidence of intent to do so, it is highly unlikely that it would be challenged criminally by the U.S. Department of Justice. Moreover, absent the existence of an agreement to increase prices or restrain output, it is unlikely that the exchange of information necessary for the provision of the service or good would be considered *per se* illegal. The Supreme Court has cautioned that the *per se* rule is a "demanding standard" and made clear that any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than … upon formalistic line drawing."[7]

#### b. Analysis of Information Exchanges Under the Rule of Reason

Conduct that does not always or almost always result in higher prices or reduced output is analyzed under the rule of reason.[8] Under this analytical

---

[6] Courts have considered horizontal agreements among competitors to use a specific method of quoting prices to be *per se* illegal as price fixing. *See, e.g.,* Catalano, Inc. v. Target Sales, 446 U.S. 643, 647-48 (1980); *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 363-64 (3d Cir. 2004).

[7] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 (1977).

[8] Where there is other direct or indirect evidence suggesting a price-fixing agreement, courts have analyzed information exchanges as a "plus factor" particularly indicative of a *per se* violation of the antitrust laws. *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191, 198, 213 (2d Cir. 2001) (characterizing information exchanges as either indirect evidence that can help support, with additional "plus factors," an inference of a price-fixing agreement, or a "facilitating practice" that, by itself, may be barred under the rule of reason); Wilcox v. First Interstate Bank, 815 F.2d 522, 525-26 (9th Cir. 1987) (considering "plus factors" such as "price parallelism, product uniformity, exchange of price information, and opportunity to meet to form anti-competitive policies" to determine whether inference of *per se* violation is reasonable). *But see* United States v. Citizens & S. Nat'l Bank, 422

framework, if a plaintiff is able to show that a challenged conduct or agreement is likely to have substantial anticompetitive effects, the defendant can then rebut that showing by offering evidence of the procompetitive virtues of the conduct or agreement, including economic efficiencies.[9]

If a plaintiff challenges an information exchange under a rule of reason theory, the parties will have an opportunity to explain that procompetitive benefits of the arrangement—such as enabling new products to come to market and creating operating efficiencies through joint buying, production, or selling arrangements resulting in cost savings—outweigh any possible anticompetitive effects.

## II. Recent FTC Consent Decrees Addressing Information Exchanges Among Competitors in the Petroleum Industry

The Federal Trade Commission has recognized that circumstances exist in which information exchanges among competitors can be procompetitive.[10] However, in some cases, the Commission has required the implementation and maintenance of elaborate firewalls and other restrictions designed to limit the types of information exchanged and the people or departments that have access to potentially competitively-sensitive information in order to allay concerns that information exchanges could result in reductions in competition.

---

U.S. 86, 113 (1975) (holding that "the dissemination of price information is not itself a *per se* violation"). But where there is insufficient evidence that an agreement was actually reached or where the conduct may have procompetitive benefits, courts have analyzed information exchanges under the rule of reason. *See, e.g.*, *In re* Beef Indus. Antitrust Litig., 907 F.2d 510, 513 (5th Cir. 1990) (price information exchange not unlawful when only one of several factors (e.g., effects of competitive by-product market, labor contracts, and local market conditions such as weather and accessibility) used by firms to independently set prices and was therefore "not the type of determinative pricing information which enables price fixing").

[9] Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456-58 (1991).

[10] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors (2000) [hereinafter Collaboration Guidelines], at 23, *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

### a. Pilot/Flying J

In the summer of 2010, the FTC obtained a consent order to relieve concerns that the proposed $1.8 billion acquisition by Pilot Corporation and Propeller Corp. of certain assets, stock, and other interests in Flying J Inc.'s travel center and related businesses,[11] would reduce competition in the market for over-the-road sale of diesel to long-haul fleets by national travel center operators in the contiguous United States. The Commission alleged that Pilot and Flying J were the first and second choices, respectively, for a number of long haul fleets.[12]

In order to relieve these concerns, the FTC required, among other things, Pilot to divest 26 travel centers to Love's, another travel center operator that primarily operated in the southern United States.[13] As part of this divestiture, Flying J was required to provide, at Love's option, nondiscriminatory access to and use of Flying J's TCH fuel card system for a period of up to three years and to develop a firewall protocol to restrict the flow of confidential information to Flying J employees relating to Love's customers. Specifically, the Order prohibited:

> Respondents' employees affiliated with the TCH Fuel Card System … from providing TCH Customer Confidential Business Information to either the TCH Executive Board or to a Respondent.[14]

The Order further defined TCH Customer Confidential Business Information as including:

> the Acquirer's confidential and/or proprietary information gathered pursuant to a TCH Merchant Agreement,

---

[11] Decision and Order, In the Matter of Pilot Corp. et al., No. 091-0125 (July 30, 2010), *available at* http://www.ftc.gov/os/caselist/0910125/index.shtm [hereinafter Pilot July 2010 Order].

[12] Analysis of Agreement Containing Consent Order To Aid Public Comment In the Matter of Pilot Corp. et al., No. 091-0125 (June 30, 2010), *available at* http://www.ftc.gov/os/caselist/0910125/index.shtm, at 2.

[13] Pilot July 2010 Order at 7; Press Release, Fed. Trade Comm'n, FTC Approves Final Order Settling Charges that Pilot Corporation's Takeover of Flying J's Travel Center Business Was Anticompetitive, Nov. 23, 2010, *available at* http://www.ftc.gov/os/caselist/0910125/index.shtm.

[14] Pilot July 2010 Order at 8.

> including, but not limited to, the identity of the merchant's customers, the location of customer purchases, products or services purchased or sold, prices of products or services, volumes of diesel, discounts, and other transaction terms….[15]

Put another way, post-merger, if Love's opted to use the TCH Fuel Card System, firewalls would prohibit Pilot employees from sharing information about Love's customers that Pilot could then use to gain an unfair advantage in competing against Love's.

After an extended notice and comment period, the Commission issued a final Decision and Order in November 2010 that included "certain modifications," one of which directly applied to the firewall provisions of the preliminary Decision and Order.[16] In the modified Order, the FTC required "a broader firewall that will apply to *all merchant customers* of Pilot's TCH subsidiary for the length of the order."[17] Thus, this broader firewall prohibits Pilot from providing any competitively-sensitive information relating to any customer—not just Love's—about TCH card products to non-card employees.

**b. Kinder Morgan**

In 2007, the FTC required remedies to address competitive concerns raised by the $22 billion privatization of Kinder Morgan, Inc. by KMI management and a group of private investment firms.[18] The investigation of this transaction was somewhat unusual because the proposed acquisition did not involve a direct horizontal overlap between the acquirers and the acquired entity. Instead, the proposed acquisition would have resulted in two of the private investment firms holding interests in KMI and the general partner of one of its competitors, Magellan Midstream Partners, L.P.[19]

---

[15] *Id*. at 5.

[16] *See*, *e.g.*, Letter to Commentator The Honorable Dennis J. Kucinich, Nov. 15, 2010, *available at* http://www.ftc.gov/os/caselist/0910125/index.shtm.

[17] *See*, *e.g.*, *id.*

[18] Decision and Order, In the Matter of TC Group, L.L.C. at al., No. 061-0197, Mar. 14, 2007, *available at* http://www.ftc.gov/os/caselist/0610197/index.shtm [hereinafter Kinder Morgan Order].

[19] Analysis of Proposed Agreement Containing Consent Orders to Aid Public Comment, In the Matter of TC Group, L.L.C. at al., No. 061-0197, Jan. 25,

The KMI investor group included, among other investors, the Carlyle/Riverstone Global Power and Energy Fund III, L.P., a private equity fund jointly managed by The Carlyle Group and Riverstone Holdings LLC, and Carlyle Partners IV, L.P., an affiliate of Carlyle.[20] Carlyle and Riverstone would acquire approximately 11.3% of KMI through their joint fund, and the Carlyle-affiliated Carlyle Partners IV additionally would acquire approximately 11.3% independently of Riverstone.[21]

Through another joint private equity fund, Carlyle and Riverstone owned or controlled interests in Magellan Midstream Partners, L.P., a major competitor of KMI in the provision of terminaling services for gasoline and other light petroleum products throughout the southeastern United States.[22] Through their control of a 50% stake in the general partner that controls Magellan, Carlyle and Riverstone had the right to appoint representatives to the boards of the various business entities within Magellan.[23] The FTC alleged that this stake gave Carlyle and Riverstone an effective veto over important actions taken by Magellan.[24] Carlyle and Riverstone also had the right to receive competitively sensitive, non-public information about Magellan and its businesses.[25]

The FTC challenged the proposed KMI transaction under Section 5 of the FTC Act and Section 7 of the Clayton Act.[26] Although neither Carlyle nor Riverstone had (nor post-acquisition would have) the ability to affirmatively direct the actions of either KMI or Magellan, the FTC alleged that the overlapping board representation, veto power, and potential for the exchange of competitively sensitive information could increase the likelihood that terminal fees and prices for gasoline and other light petroleum products would increase in each of the relevant sections of the country.

---

2007, *available at* http://www.ftc.gov/os/caselist/0610197/index.shtm, at 1 [hereinafter Kinder Morgan AAPC].

[20] *Id*. at 1.

[21] *Id*.

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

[23] *Id*.

[24] *Id*. at 2.

[25] *Id*.

[26] Kinder Morgan Order at 1.

To address these concerns, the FTC imposed several conditions designed to make Carlyle's and Riverstone's investment in Magellan effectively passive.[27] In order to consummate the transaction, the FTC required Carlyle and Riverstone to do three things: first, remove their representatives from the Magellan boards; second, cede all control of Magellan to Madison Dearborn Partners, the private equity firm that held the remaining 50% stake in the general partner that controls Magellan; and, third, establish procedures to prevent the exchange of competitively sensitive, non-public information between Magellan and KMI.[28]

The FTC noted that one of the funds involved, CR-II, entered into an agreement with Magellan to modify their partnership agreement to remove the CR-II representatives from the Magellan board and to ensure that CR-II does not have the right to elect directors in the future.[29] This is an example of a structural implementation of a firewall provision.

Specifically, the FTC provided detailed information about the types of firewalls the companies were required to establish. First, paragraph II.B. of the Order relates to the flow of non-public information from Magellan to KMI.[30] It provides that as long as Carlyle, Riverstone, or CR-III holds interests in KMI (including the right to appoint a director or to obtain non-public information about KMI), Carlyle, Riverstone, or CR-II cannot provide any information about Magellan to KMI or any KMI representatives. Even though the Order required Respondents to make their interests in Magellan passive, there was still a concern that by virtue of their ownership interests Respondents' may be privy to nonpublic information about Magellan that they could then share with KMI, an entity which they would control.

Paragraph II.C. of the Order is intended to address information flowing the other way: from KMI to Magellan.[31] The possibility of nonpublic information flowing from KMI to Magellan was much greater than the chance of nonpublic information flowing the other way since Respondents would have full board representation on KMI and would be privy to these types of nonpublic disclosures. Accordingly, the Commission prohibited Respondents from sharing any nonpublic information that they or their representatives may gain from their ownership interests in and board positions with KMI with anyone at Magellan.

[27] *See* Kinder Morgan AAPC at 2.
[28] Kinder Morgan Order at 6-9.
[29] Kinder Morgan AAPC at 5.
[30] Kinder Morgan Order at 6-7.
[31] *Id*. at 7-8.

Even though Respondents were required to make their interests in Magellan passive, it was possible that some scenario existed in which they could benefit from Magellan having competitively-sensitive information about KMI's operations.

For the information restrictions imposed by the Order flowing in both directions, the Respondents were required to "institute procedures and requirements throughout the various entities of the proposed Respondents to ensure that non-public information is protected as required by the proposed Order."[32]

## III. Practical Advice

If business practicalities require companies to exchange competitively-sensitive information with one another, those companies must implement appropriate safeguards in order to prevent inappropriate use or disclosure of such information. To avoid the appearance of anticompetitive conduct and to minimize antitrust risk, the parties should limit the scope of information exchanged, how it is used and the persons provided access to such information. As a practical matter, limits imposed on the use of information must take several forms, including firm policies relating to the use of competitor information, cultural respect for competition and antitrust compliance within the company, and electronic firewalls that prohibit certain people or people with certain functions in the firm (such as sales and marketing functions, in particular) from being able to access network drives and other shared database space in which competitively-sensitive information of the firm's competitors may be stored.

### a. Use of Outside Consultants

In establishing firewalls and related procedures, companies may consider retaining third-party consultants, particularly those with experience in computer networks, to design and implement electronic firewalls. Such firewalls can restrict access or files to certain user groups and can be skipped during any company-wide document searches performed by employees in other functional areas.

### b. Physical Space Considerations

If a group of employees will have access to competitively-sensitive information to which another group of that same firm's employees should not

[32] Kinder Morgan AAPC at 6.

have access, the firm should consider the physical working location of the two groups. For example, if a vertically-integrated oil company's pipeline subsidiary is receiving information from the competitors of one of its sister entities, it may not make sense to have both of those groups of employees seated on the same floor of a building in easily overheard cubicles with shared printers and break rooms.

#### c. Scope of Information Exchanges

To minimize the antitrust risk associated with any exchange of pricing information, firms should take care to collect only information that is necessary for the purpose at hand, and not more.

#### d. Limiting Employee Access

Any employee who is in a position to use the competitor's competitively-sensitive information to the detriment of the other company should not have access to the information. As a general rule, if the information obtained about a competitor relates to price or output, individuals in the receiving company's sales and/or marketing department should not have access to that information. The parties should limit access to any competitively-sensitive information to people without day-to-day decision-making responsibilities for setting prices or capacity utilization and output at each company.

#### e. Confidentiality Agreements

Any company receiving competitively-sensitive information from its competitors should require its employees receiving this information to sign a confidentiality agreement in which each employee acknowledges that he or she will use the information only for the intended purpose and will not disclose it to any unauthorized person. Similarly, any person within the company who would be particularly well positioned to use competitively-sensitive information to the detriment of the competitor should also sign an acknowledgement that he or she will not seek to obtain that information from the people within the company who do have access to it.

Each person signing such a confidentiality agreement should be required, perhaps as part of an annual training process, to certify each year that he or she has not received any of the information described above.

#### f. Compliance Training and Certification

Providing employees with a handbook on their first day on the job is most likely not sufficient to ensure ongoing compliance with corporate firewall or information management policies. Annual (or more frequent) training programs for individuals on both sides of the firewall should reiterate corporate policies. E-learning tools such as online compliance refresher mini-courses and quick response online questionnaires can provide easy opportunities to reinforce training and compliance throughout the year.

## IV. Conclusion

Recent FTC consent decrees demonstrate the Commission's continued interest in reviewing potential opportunities in which firms may gain access to their competitor's information. Establishing appropriate information safeguards requires careful consideration of computer networks, physical space, and company compliance culture, among other factors, as well as reinforcement of corporate policies after procedures are implemented.