

Analysis to Aid Public Comment
In the Matter of Step N Grip, LLC,
File No. 151-0181

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an agreement containing consent order (“Consent Agreement”) from Step N Grip, LLC (“Step N Grip”). The Commission’s Complaint alleges that Step N Grip violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by inviting a competitor in the sale of certain rug devices to set and raise prices.

Under the terms of the proposed Consent Agreement, Step N Grip is required to cease and desist from communicating with its competitors about prices. It is also barred from entering into, participating in, inviting, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices.

The Consent Agreement has been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will review the Consent Agreement again and the comments received, and will decide whether it should withdraw from the Consent Agreement or make final the accompanying Decision and Order (“Proposed Order”).

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment. It is not intended to constitute an official interpretation of the proposed Consent Agreement and the accompanying Proposed Order or in any way to modify their terms.

I. The Complaints

The allegations of the Complaint are summarized below:

Step N Grip markets and sells a device called NeverCurl that is intended to keep the corners of a rug from curling. Step N Grip sells NeverCurl primarily through Amazon.com; Step N Grip also sells NeverCurl through its own website.

Step N Grip’s closest competitor in the sale of such rug devices is Competitor A, a company that also sells its product on Amazon.com. For several months prior to June 1, 2015, Step N Grip generally priced NeverCurl at \$13.95 per package, while Competitor A priced its product at \$16.99 per package.

On June 1, 2015, Competitor A lowered its price on Amazon.com to \$13.49 in an effort to compete more aggressively with Step N Grip. In response, Step N Grip lowered its price on Amazon.com to \$12.95.

On June 7, 2015, Competitor A lowered its price on Amazon.com to \$11.95 in response to Step N Grip. That same day, Step N Grip lowered its price to \$11.95 on Amazon.com and

sent an e-mail message to Competitor A. The communication, in its entirety, read: “We both sell at \$12.95? Or, \$11.95?”

Competitor A reported the communication to the FTC.

II. Analysis

Step N Grip’s June 7 message to Competitor A is plainly an attempt to arrange an agreement between the two companies setting and increasing the price of their competing products. It is an invitation to collude. The Commission has long held that invitations to collude violate Section 5 of the FTC Act, and this is unaltered by the Commission’s recent Statement on Section 5.

In a recent statement, the Commission explained that unfair methods of competition under Section 5 “must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications.”¹ Potential violations are evaluated under a “framework similar to the rule of reason.”² Competitive effects analysis under the rule of reason depends upon the nature of the conduct that is under review.³

An invitation to collude is “potentially harmful and . . . serves no legitimate business purpose.”⁴ For this reason, the Commission treats such conduct as “inherently suspect” (that is, presumptively anticompetitive).⁵ This means that an invitation to collude can be condemned under Section 5 without a showing that the respondent possesses market power.⁶

The Commission has long held that an invitation to collude violates Section 5 of the FTC Act even where there is no proof that the competitor accepted the invitation.⁷ There are various

¹ Fed. Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015) (Section 5 Unfair Methods of Competition Policy Statement), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf. Commissioner Ohlhausen dissented from the issuance of the Section 5 Unfair Methods of Competition Policy Statement. *See* <https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy>.

² Section 5 Unfair Methods of Competition Policy Statement.

³ *See, e.g., California Dental Ass’n v. FTC*, 526 U.S. 756, 781 (1999) (“What is required . . . is an inquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”).

⁴ *In re Valassis Commc’ns., Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of Agreement Containing Consent Order to Aid Public Comment); *see also* Address by FTC Chairwoman Edith Ramirez, Section 5 Enforcement Principles, George Washington University Law School at 5 (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

⁵ *See, e.g., In re North Carolina Bd. of Dental Examiners*, 152 F.T.C. 640, 668 (2011) (noting that inherently suspect conduct is such that be “reasonably characterized as ‘giv[ing] rise to an intuitively obviously inference of anticompetitive effect.’” (citation omitted)).

⁶ *See, e.g., In re Realcomp II, Ltd.*, 148 F.T.C. ____, No. 9320, 2009 FTC LEXIS 250 at *51 (Oct. 30, 2009) (Comm’n Op.) (explaining that if conduct is “inherently suspect” in nature, and there are no cognizable procompetitive justifications, the Commission can condemn it “without proof of market power or actual effects”).

⁷ *See, e.g., In re Valassis Commc’ns, Inc.*, 141 F.T.C. 247 (2006); *In re Stone Container*, 125 F.T.C. 853 (1998); *In re Precision Moulding*, 122 F.T.C. 104 (1996). *See also In re McWane, Inc.*, Docket No. 9351, *Opinion of the*

reasons for this. First, unaccepted solicitations may facilitate coordination between competitors because they reveal information about the solicitor's intentions or preferences. Second, it can be difficult to discern whether a competitor has accepted a solicitation. Third, finding a violation may deter similar conduct—conduct that has no legitimate business purpose.⁸

III. The Proposed Consent Order

The Proposed Order contains the following substantive provisions:

Section II, Paragraph A of the Proposed Order enjoins Step N Grip from communicating with its competitors about rates or prices, with a proviso permitting public posting of rates.

Section II, Paragraph B prohibits Step N Grip from entering into, participating in, maintaining, organizing, implementing, enforcing, inviting, offering, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices.

Section II, Paragraph C bars Step N Grip from urging any competitor to raise, fix or maintain its price or rate levels or to limit or reduce service terms or levels.

Section II, Paragraph D forbids Step N Grip from instructing or encouraging a distributor or seller to engage in the conduct proscribed in Section II, Paragraphs A through C.

Sections III-VI of the Proposed Order impose certain standard reporting and compliance requirements on Step N Grip.

The Proposed Order will expire in 20 years.

Commission on Motions for Summary Decision at 20-21 (F.T.C. Aug. 9, 2012) (“an invitation to collude is ‘the quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5’”) (citing the Statement of Chairman Liebowitz and Commissioners Kovacic and Rosch, *In re U-Haul Int’l, Inc.*, 150 F.T.C. 1, 53 (2010)). This conclusion has been endorsed by leading antitrust scholars. See P. Areeda & H. Hovenkamp, VI ANTITRUST LAW ¶ 1419 (2003); Stephen Calkins, *Counterpoint: The Legal Foundation of the Commission’s Use of Section 5 to Challenge Invitations to Collude is Secure*, ANTITRUST Spring 2000, at 69. In a case brought under a state’s version of Section 5, the First Circuit expressed support for the Commission’s application of Section 5 to invitations to collude. *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012).

⁸ *In re Valassis Comm’c, Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of Agreement Containing Consent Order to Aid Public Comment).