Analysis to Aid Public Comment
In the Matter of Drug Testing Compliance Group, LLC,
File No. 151 0048

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing consent order ("Consent Agreement") from Drug Testing Compliance Group, LLC ("DTC Group"). The Commission's Complaint alleges that DTC Group violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by inviting a competitor to enter a customer allocation agreement.

Under the terms of the proposed Consent Agreement, DTC Group is required to cease and desist from communicating with its competitors about customers and prices. The Consent Agreement also prohibits DTC Group from entering into, participating in, inviting, or soliciting an agreement with any competitor to allocate customers, to divide markets, 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 Complaint

The allegations of the Complaint are summarized below:

DTC Group markets and sells an array of services to commercial drivers, commercial trucking firms, and other persons that facilitate compliance with various regulations administered by the Department of Transportation and the Federal Motor Carrier Safety Administration, including regulations relating to drug and alcohol testing, safety audits, and driver qualifications.

DTC Group primarily utilizes telemarketing and the internet to market and sell its services. DTC Group competes with several firms throughout the United States offering similar services.

DTC Group and Competitor A market and sell similar services in direct competition. Beginning in 2013 and continuing to date, DTC Group and Competitor A have competed for one another's customers by offering lower prices for the services they sell. In some instances, one firm can induce a customer, whose contract is terminable at will, to switch service providers by offering lower prices.

On or about June 27, 2014, the president of DTC Group, David Crossett, contacted Competitor A to complain that Competitor A's sales personnel had induced a DTC Group customer to switch service providers. Mr. Crossett requested a meeting with Competitor A to discuss the matter.

Mr. Crossett met with the principals of Competitor A on July 10, 2014. Mr. Crossett proposed that the firms agree not to solicit or compete for one another's customers. Specifically, Mr. Crossett proposed that DTC Group and Competitor A should reciprocally agree to refrain from selling or attempting to sell a service to a customer if the rival firm had previously arranged to sell the same service to the customer. Mr. Crossett referred to this arrangement as "First Call Wins," and explained that such agreement would permit each company to sell its services to customers without fearing that its rival would later undercut it with a lower price offer.

II. Analysis

Mr. Crossett's communication to Competitor A is an attempt to arrange a customer allocation agreement between the two companies. The invitation, if accepted, would be a *per se* violation of the Sherman Act.[1] 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 that 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."[2] Potential violations are evaluated under a "framework similar to the rule of reason."[3] Competitive effects analysis under the rule of reason depends upon the nature of the conduct that is under review.[4]

An invitation to collude is "potentially harmful and . . . serves no legitimate business purpose."[5] For this reason, the Commission treats such conduct as "inherently suspect" (that is,

[1] *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1372 (6th Cir. 1988) ("[A] horizontal agreement between two competitors to refrain from seeking business from each other's existing accounts … is plainly a form of customer allocation and, hence, is the type of 'naked restraint' which triggers application of the *per se* rule of illegality."); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078 (10th Cir.), *cert. denied*, 437 U.S. 903 (1978).

[2] 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.

[3] Section 5 Unfair Methods of Competition Policy Statement.

[4] *See, e.g.*, *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) ("What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.").

[5] *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.

presumptively anticompetitive).[6] This means that an invitation to collude can be condemned under Section 5 without a showing that the respondent possesses market power.[7]

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.[8] 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 that has no legitimate business purpose.[9]

III. The Proposed Consent Order

The Proposed Order has the following substantive provisions:

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

Section II, Paragraph B prohibits DTC Group 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 DTC Group from urging any competitor to raise, fix, or maintain its price or rate levels, or to limit or reduce service terms or levels.

Sections III-VI of the Proposed Order impose reporting and compliance requirements on DTC Group.

The Proposed Order will expire in 20 years.

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[6] *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 can be "reasonably characterized as 'giv[ing] rise to an intuitively obviously inference of anticompetitive effect.'") (citation omitted).
[7] *See, e.g.*, *In re Realcomp II, Ltd.*, 148 F.T.C. ___, Docket 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").
[8] *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 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 Leibowitz 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. *See Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012).
[9] *In re Valassis Commc'ns, Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of Agreement Containing Consent Order to Aid Public Comment).