Analysis to Aid Public Comment
In the Matter of Oregon Lithoprint Inc.,
File No. 161-0230

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing consent order ("Consent Agreement") from Oregon Lithoprint Inc. ("OLI"). The Commission's Complaint alleges that OLI violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by inviting a competitor in the publication of foreclosure notices to divide clients by geographic market.

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

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:

OLI owns the *News-Register*, a twice-weekly community newspaper based in Yamhill, Oregon. Among other things, the *News-Register* charges clients to publish a type of legal notice known as a foreclosure notice. Under Oregon law, parties foreclosing on real property must place a notice of foreclosure in a qualifying newspaper in the county within which the property is located.

The *News-Register*'s only competitor in Yamhill County is *The Newberg Graphic*, a weekly community newspaper. *The Newberg Graphic* also publishes foreclosure notices, and it charges considerably less than the *News-Register* for the service. The *News-Register* has more subscribers and a wider circulation within Yamhill County than *The Newberg Graphic*.

In August 2016, the publisher of the *News-Register* learned that a client intended to place foreclosure notices only in *The Newberg Graphic* from that point on because *The Newberg Graphic* was less expensive than the *News-Register*. In response, on August 29, 2016, the publisher emailed a manager at the parent company of *The Newberg Graphic* and explained the publisher's view that, under state law, foreclosure notices should be placed in the newspaper with the largest circulation in the area that the property is located. The publisher concluded his email by inviting the competitor to join the *News-Register* in instructing mutual clients that they should place foreclosure notices in the newspaper dominant in the area of the foreclosed property. The parent company of the *The Newberg Graphic* rejected the invitation and reported it to the Federal Trade Commission.

Several months later, in October 2016, the publisher of the *News-Register* emailed the competitor again to state that the *News-Register* had told a client to use *The Newberg Graphic* because the property in question was located in its area, and that the client was in fact going to use *The Newberg Graphic* to publish the notice. He ended the email stating "[i]t is probably too much to expect that others would do likewise."

The parent company of the *The Newberg Graphic* interpreted this second email as another invitation to collude, rejected the invitation, and reported it to the Federal Trade Commission.

II. Analysis

OLI's August 29, 2016, email to its competitor is an explicit attempt to arrange an agreement between the two companies to divide foreclosure notices by geography. It is an invitation to collude. The October 2016 email is also an invitation to collude: OLI proposed a market allocation scheme and expressed a hope that its competitor would join that conduct. The Commission has long held that invitations to collude violate Section 5 of the FTC Act.

In a 2015 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,

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[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. Acting Chairman 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.

presumptively anticompetitive).[5] Accordingly, 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] This is for several reasons. 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 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 OLI from entering or attempting to enter any agreement to refuse to publish legal notices or allocate customers for the publication of legal notices.

Section II, Paragraph B prohibits OLI from publically or privately communicating with a competitor that the competitor should advice customers to place foreclosure notices in the newspaper with the widest circulation in the area in which the property is located, or refuse to publish notices for properties located in a competitor's primary distribution area.

Section II, Paragraph C, contains three provisos. The first allows OLI to communicate with any governmental body regarding the proper interpretation of state law related to legal notices. The second allows OLI to participate with any effort of the Oregon newspaper association to lobby any governmental body regarding legal notices. The third allows OLI to disseminate information regarding legal notices to the public.

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[5] *See, e.g.*, *In re North Carolina Bd. of Dental Examiners*, 152 F.T.C. 640, 668 (2011) (noting that conduct is inherently suspect if it can 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 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).

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

The Proposed Order will expire in 10 years.