Analysis to Aid Public Comment
In the Matter of Fortiline, LLC,
File No. 151-0000

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing consent order ("Consent Agreement") from Fortiline, LLC ("Fortiline"). The Commission's Complaint alleges that Fortiline violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by inviting a competing seller of ductile iron pipe ("DIP"), Manufacturer A, to raise and fix prices.

This is the first Commission challenge to an invitation to collude by a firm that is in both a horizontal (interbrand) and a vertical (intrabrand) relationship with the invitee, sometimes referred to as a dual distribution relationship. During the time-period relevant to the Complaint, Fortiline, a DIP distributor, sold DIP to customers in competition with Manufacturer A (principally a manufacturer, but also engaged in direct sales), while it also served as Manufacturer A's distributor in certain circumstances. Fortiline thus had a vertical distributor relationship with Manufacturer A in certain areas and circumstances and a horizontal competitor relationship with Manufacturer A in others. This case makes clear that the existence of an intrabrand relationship between firms does not immunize an invitation to fix prices for interbrand transactions falling outside of that intrabrand relationship just as the law would not condone an actual price fixing agreement under similar circumstances.

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:

Fortiline distributes waterworks infrastructure products, such as pipe (including DIP), tubing, valves, fittings and piping accessories. DIP is a commodity product used in underground waterworks distribution systems and water treatment plants. End users of DIP are primarily municipalities and water utilities. For a typical project, the end user seeks bids from multiple contractors. Contractors, in turn, solicit DIP bids from waterworks distributors (such as Fortiline) and/or directly from DIP manufacturers. Contractors that buy direct from DIP manufacturers often pay a lower price, but forgo value-added services that distributors provide.

Each of the major DIP manufacturers in the United States periodically publishes a nationwide “price list” or “pricing schedule.” Sometimes, rather than publishing a new price list, a DIP manufacturer would announce a price adjustment stated in terms of a “multiplier,” a decimal number by which the published price was multiplied to arrive at the new list price. A higher multiplier translated to a higher price for DIP. The price list and the multiplier would serve as the starting point for transaction price negotiations with customers; the final transaction price on each project was decided on a job-by-job basis.

From its founding in 1997 until late 2009, most Fortiline branches distributed only DIP manufactured by Manufacturer A. However, on or about December 14, 2009, Fortiline terminated Manufacturer A as its DIP supplier in North Carolina and in most of Virginia. After December 14, 2009, Fortiline branches in this area bid on new waterworks projects with DIP manufactured by Manufacturer B, a competitor of Manufacturer A.

After December 14, 2009, some Fortiline branches outside of North Carolina and in one part of Virginia continued to distribute Manufacturer A’s DIP. In addition, even though Fortiline terminated Manufacturer A in North Carolina and in most of Virginia, Fortiline continued to supply Manufacturer A’s DIP to contractors in that area as needed to complete projects where Fortiline had, prior to December 14, 2009, submitted a bid specifying Manufacturer A’s DIP.

Fortiline’s termination of Manufacturer A in North Carolina and most of Virginia left Manufacturer A without a major distributor in that region. In response, Manufacturer A began to market and sell DIP directly to contractors in North Carolina and most of Virginia, in competition with North Carolina and Virginia distributors and their DIP suppliers, including Fortiline and its new supplier, Manufacturer B.

Manufacturer A did not offer North Carolina and Virginia contractors the value-added services provided by distributors. In order to entice contractors to forgo those services and to buy directly from Manufacturer A, Manufacturer A offered lower prices. In response, Fortiline and other distributors (in conjunction with their DIP suppliers) reduced their own prices in order to compete with Manufacturer A’s lower prices.

On two occasions in 2010, when Fortiline and Manufacturer A were competing against one another to sell DIP in North Carolina and most of Virginia, Fortiline invited Manufacturer A to collude on DIP pricing in that region.

On February 12, 2010, the chief executive officer and the vice president of sales for Fortiline met with Manufacturer A’s vice president of sales. Among other things, they discussed Manufacturer A’s practice of selling direct in North Carolina and most of Virginia at low prices.

That evening, Fortiline’s vice president of sales forwarded to his counterpart at Manufacturer A an email reporting on market conditions in North Carolina. The email detailed Manufacturer A’s practice of undercutting its competitors’ prices. In contrast, the email reported, other major DIP manufacturers “have been trying to keep their numbers up thus far.” The Fortiline email included the following commentary: “This is the type of irrational behavior [by Manufacturer A] that we were discussing earlier today. With this approach we will be at a .22 [multiplier] soon instead of a needed .42.”

In substance, the February 12th email communicated Fortiline's dissatisfaction with Manufacturer A's low pricing in North Carolina and parts of Virginia and its preference that both Fortiline and Manufacturer A should bid to contractors using the higher .42 multiplier.

Eight months later, on October 26, 2010, executives from Fortiline and Manufacturer A met again, this time at a trade association meeting. At that meeting, Fortiline complained that Manufacturer A had sold direct to a Virginia customer, which had previously purchased from Fortiline, at a 0.31 multiplier, and that this price was "20% below market."

In substance, this October 26th conversation communicated Fortiline's dissatisfaction with Manufacturer A's lower pricing in Virginia, and its preference that both Fortiline and Manufacturer A should bid to contractors using a substantially higher multiplier in that region.

II. Analysis

The term ''invitation to collude'' describes an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output or other important terms of competition. The Commission has long held that invitations to collude violate Section 5 of the FTC Act. An invitation to collude is "potentially harmful and . . . serves no legitimate business purpose."[1] For those reasons, the Commission treats such conduct as "inherently suspect" (that is, presumptively anticompetitive).[2] This means that, in the absence of a procompetitive justification, an invitation to collude can be condemned under Section 5 without a showing that the respondent possesses market power[3] and without proof that the competitor accepted the invitation.[4] There are various reasons for this. First, unaccepted solicitations may harm competition by facilitating 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. Finally, finding a violation may deter similar conduct that has no legitimate business purpose.[5]

As described above, during the relevant time period, Fortiline competed with Manufacturer A in selling DIP to customers while also serving as Manufacturer A's distributor.

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[1] *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) (discussing invitations to collude), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

[2] *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'").

[3] *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").

[4] *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)).

[5] *In re Valassis Commc'ns*, 141 F.T.C. at 283 (Analysis of Agreement Containing Consent Order to Aid Public Comment).

Fundamentally, the fact that the firms are competitors in some transactions and collaborators in others does not alter the legal analysis. An agreement between actual or potential competitors that restrains *interbrand* price competition between the two firms presumptively harms competition. The existence of an intrabrand component to the conspirators' relationship (such as a distribution agreement or a license agreement) does not necessarily foreclose *per se* analysis.[6] The relevant issue is not whether the parties are in a vertical or horizontal *relationship*, but whether the *restraint* on competition is an intrabrand restraint or an interbrand restraint.[7] A similar analysis applies in the context of an invitation to collude.

Here, the Complaint charges that Fortiline invited Manufacturer A to collude on pricing *across the board*, including on transactions in which Fortiline was distributing for a rival manufacturer, Manufacturer B.[8] Certainly, market and price-related communications between a manufacturer and its distributor can be appropriate and procompetitive.[9] A firm may not, however, use an intrabrand relationship to shield itself from anticompetitive interbrand conduct.[10] As an intrabrand relationship will not immunize an otherwise unlawful agreement, it likewise will not immunize an unlawful invitation to collude. If Manufacturer A accepted Fortiline's requests to raise prices on projects for which the firms were interbrand competitors, the resulting agreement would be *per se* unlawful. It follows that Fortiline's communications to Manufacturer A—its attempts to secure an unlawful agreement—were unlawful invitations to collude.

III. The Proposed Consent Order

The Commission recognizes the need to tailor relief that will prevent Fortiline from engaging in the anticompetitive conduct described in the complaint, yet avoid chilling procompetitive communications and efficient contracting between Fortiline and each of its current and future suppliers.

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[6] *See Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984) ("It does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit competition."). *See also Palmer v. BRG of Georgia, Inc*., 498 U.S. 46, 49 (1990) (*per se* liability where conspirators had both horizontal and vertical (licensor/licensee) relationship); *Eli Lilly and Co. v. Zenith Goldline Pharmaceuticals, Inc*., 172 F.Supp.2d 1060 (S.D. Ind. 2001) (*per se* liability where conspirators had both horizontal and vertical relationship); *United States v. General Electric Co.*, 1997-1 Trade Cas. (CCH) ¶ 71,765 (D. Mont. 1997) (same).

[7] *See United States v. Apple, Inc*., 791 F.3d 290, 322 (2d Cir. 2015) (internal citations omitted) (rejecting Apple's argument that its role in a horizontal conspiracy with publishers should be evaluated under rule of reason because it was in a vertical relationship with publishers, noting that "it is the type of restraint that Apple agreed with the publishers to impose that determines whether the *per se* rule or the rule of reason is appropriate. These rules are means of evaluating 'whether [a] *restraint* is unreasonable,' not the reasonableness of a particular defendant's role in the scheme.").

[8] The Commission has previously found similar communications to constitute unlawful invitations to collude. *E.g., In re Step N Grip LLC*, 160 F.T.C. ___, Docket No. C-4561 (Dec. 7, 2015), https://www.ftc.gov/enforcement/cases-proceedings/151-0181/step-n-grip-llc-matter (respondent communicated to competitor that both parties should sell at the same price); *In re Precision Moulding*, 122 F.T.C. 104 (1996) (respondent complained to competitor that the competitor's pricing was "ridiculously low" and that the competitor did not have to "give the product away"); *In re AE Clevite*, 116 F.T.C. 389, 391 (1993) (respondent complained to competitor about its pricing, and subsequently faxed the competitor comparative price lists from both companies).

[9] *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764-65 (1984).

[10] *See supra* notes 6-8.

The Proposed Order contains the following substantive provisions: Section II prohibits Fortiline from entering into, attempting to enter into, participating in, maintaining, organizing, implementing, enforcing, inviting, encouraging, offering or soliciting an agreement or understanding with any competitor to raise or fix prices or any other pricing action, or to allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories. Two provisos apply to Section II. The first proviso makes clear that Fortiline may engage in conduct that is reasonably related to, and reasonably necessary to achieve the procompetitive benefits of, a lawful manufacturer-distributor relationship, joint venture agreement, or lawful merger, acquisition, or sale agreement. The second proviso makes clear that Fortiline may negotiate and enter into an agreement to buy DIP from, or sell DIP to, a competitor.

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

The Proposed Order will expire in 20 years.