

**Analysis to Aid Public Comment**  
*In the Matter of Step N Grip, LLC*

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.”<sup>1</sup> Potential violations are evaluated under a “framework similar to the rule of reason.”<sup>2</sup> Competitive effects analysis under the rule of reason depends upon the nature of the conduct that is under review.<sup>3</sup>

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

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.<sup>7</sup> There are various

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<sup>1</sup> 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](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>.

<sup>2</sup> Section 5 Unfair Methods of Competition Policy Statement.

<sup>3</sup> *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.”).

<sup>4</sup> *In re Valassis Commc’ns., Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of .4(ncl42u35.44 Tm ( )T30)-7.7(a)-7. 0 Tc 0 mtea c7.1(ng )

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.<sup>8</sup>

### **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.

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