

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 competitor to enter a customer allocation agreement.

Under the terms of the proposed Consent Agreement, DTC Group required to cease and desist from communicating with competitors about customers and prices. The Consent Agreement also prohibits DTC Group

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 determine whether a competitor has accepted a solicitation. Third, finding a violation may deter similar conduct that has no legitimate business purpose.

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 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.

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 it can be "reasonably characterized as 'giv[ing] rise to an intuitively obvious inference of anticompetitive effect.'" (citation omitted)).

⁷ See, e.g., *In re Realcomp, 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