

FTC Continues Vigorous Section 5 Enforcement

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On July 21, 2014, the Federal Trade Commission (FTC or Commission) accepted a consent agreement, subject to final approval, to settle charges with two Internet resellers of Universal Product Code (UPC) barcodes accused of violating Section 5 of the FTC Act (Section 5) by inviting competitors to collude.¹ The FTC Act, which may only be enforced by the FTC, empowers the Commission to prevent “unfair methods” of competition, a broad and liberal standard that can capture a range of unilateral and coordinated anticompetitive conduct. While the parameters of Section 5 have been the subject of ongoing debate, including whether written Section 5 guidelines should be issued to provide more guidance as to when the FTC will pursue a Section 5 case, this resolution continues a trend of FTC enforcement for invitations to collude and affirms that the FTC views such conduct as within the scope of Section 5.²

An “invitation to collude” involves a communication from one party to an actual or potential competitor stating that the party would like to coordinate on important terms of competition (such as price or output).³ In the FTC’s view, invitations need not include explicit language coordinating competitive actions to be actionable; they need only set forth proposed terms of coordination which, if accepted, would constitute a *per se* violation of the Sherman Act.

Here, the FTC alleged that in August 2013, the principal of InstantUPCCodes.com (Instant) sent proposals to representatives of two other UPC competing reseller companies, Nationwide Barcode (Nationwide) and “Competitor A,” inviting them to join Instant and collectively raise UPC prices to match another reseller, “Competitor B.”⁴ The proposed scheme was conditioned on the universal acceptance of the price increase by Nationwide, Instant and Competitor A. The FTC cited the highly provocative communications extensively in its complaint, calling the brazen attempts to collude “particularly egregious.”⁵ One email specifically referenced by Bureau of Competition Director Deborah L. Feinstein on the FTC Bureau of Competition Blog, shows Instant’s principal unambiguously attempting to engage his direct competitor in a price-fixing scheme:

- 1 In re InstantUPCCodes.com and In re Nationwide Barcode, File No. 141-0036, *Agreement Containing Consent Order* (F.T.C. July 21, 2014).
- 2 See, e.g., *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) (quoting Chairman Leibowitz and Commissioners Kovacic and Rosch that “an invitation to collude is ‘the quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5.’”) (citing *In re U-Haul Int’l, Inc.*, 150 F.T.C. 1, 53 (2010)). See also *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012) (quoting the Commission that “invitations to collude increase the risk of anticompetitive harm to consumers, and as such, can violate Section 5 of the FTC Act.”) (citing *FTC Summary*, 75 Fed. Reg. at 35034); *In re AmeriGas and Blue Rhino*, Docket No. 9360, *Administrative Complaint* at 10 (F.T.C. March 27, 2012) (“Respondents colluded by secretly agreeing that neither would deviate from the planned fill reduction . . . Their concerted actions unreasonably restrained trade and constituted unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act”).
- 3 *In re InstantUPCCodes.com and In re Nationwide Barcode*, File No. 141-0036, *Analysis to Aid Public Comment* at 3 (F.T.C. July 21, 2014).
- 4 *Id.* While companies generally pay a membership fee to join an international association that issues UPCs, some small businesses purchase UPC barcodes from an online secondary market to avoid the costs of membership. In recent years, increased competition in the UPC reseller market has lowered prices for secondary UPCs.
- 5 InstantUPCCodes.com, *supra* note 5, at 1-2.

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Hello Phil, Our company name is InstantUPCCodes .com, as you may be aware, we are one of your competitors within the same direct industry that you are in. ... Here's the deal Phil, I'm your friend, not your enemy. ... Here's what I'd like to do: All 3 of us- US, YOU and [Competitor A] need to match the price that [Competitor B] has. ... I'd say that 48 hours would be an acceptable amount of time to get these price changes completed for all 3 of us. The thing is though we all need to agree to do this or it won't work. ... Reply and let me know if you are willing to do this or not.⁶

Nationwide and Instant subsequently and repeatedly sought to obtain Competitor A's consent to engage in the coordination, but ultimately did not take any steps to actually raise prices when Competitor A did not respond.⁷ The FTC asserted that these communications about price levels continued into January 2014 and only ceased when Nationwide and Instant became aware of the FTC's investigation.

The proposed order settling the complaints against Instant and Nationwide prohibits both companies from (1) communicating with their competitors about barcode rates or prices; (2) entering into an agreement with any competitor to divide markets, allocate consumers or fix prices; and (3) urging any competitor to manipulate prices or reduce the levels of service they provide.

The FTC expressly observed the distinction between an invitation to collude and acceptance of that invitation. If an invitation to collude is accepted and the competitors reach an agreement, the acceptance constitutes a *per se* violation of the Sherman Act and a violation of Section 5 of the FTC Act.⁸ Where there is acceptance of an invitation, the FTC will refer the matter to the Department of Justice for investigation, which may result in monetary penalties and, potentially, criminal liability.

Director Feinstein noted that invitations to collude take many forms and that even public communications can violate Section 5 in some circumstances.⁹ For example, she referenced that the Commission previously had charged a firm with making statements in an analyst call setting forth desired terms of collusion without a legitimate business purpose.¹⁰ The Commission explained in that case that the statements provided information that ordinarily would not have been disclosed to the securities community, and the company would not have made the statements except in the expectation that its sole competitor would be listening.¹¹

The *Instant/Nationwide* case underscores the need for firms to implement ongoing antitrust compliance training and monitoring. It is critical to tread carefully when interacting with competitors to avoid antitrust violations. As the FTC noted, less egregious conduct than undertaken by the Instant/Nationwide executives could result in Section 5 liability. Moreover, repeated attempts at collusion are not required for the Commission to find a violation.¹² In particular, it is critical to educate business representatives how to handle any invitation to collude they may receive. A comparison of Nationwide's and Competitor A's reactions and the resulting focus on the FTC's review reveals the benefits of ignoring, disavowing or, where appropriate, reporting such communications to the antitrust authorities.

6 *Id.*

7 *Id.*

8 *Id.*

9 Debbie Feinstein, *Different methods, same old antitrust problem*, Competition Matters (Jul 21, 2014 12:23 PM) <http://www.ftc.gov/news-events/blogs/competition-matters/2014/07/different-methods-same-old-antitrust-problem>.

10 *Id.* (citing *In re Valassis Communications*, Docket No. C-4160, *Decision and Order* (F.T.C. March 14, 2006).

11 *Id.*

12 *In re InstantUPCCodes.com*, *supra* note 5, at 4.

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