

## An FTC Reminder On Communicating With Competitors

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The Federal Trade Commission has settled charges that two of the leading online barcode resellers violated Section 5 of the FTC Act by inviting competitors to collude and raise prices for barcodes sold over the Internet. Even though the settlement essentially only requires the online barcode resellers to agree not to break the law, the order also puts them in the undesirable position of operating under FTC supervision for a number of years. The conduct alleged here was extreme, but provides a warning that, even when the FTC cannot prove an agreement to fix prices or allocate customers, it still may seek relief.

### Alleged Conduct

The FTC alleged that Jacob J. Alifraghis and Philip B. Peretz (collectively, with their companies, respondents) exchanged a number of emails with each other and a third online barcode reseller (Competitor A) in which they proposed to increase their prices to the higher level set by a fourth online barcode reseller (Competitor B). Alifraghis, in the first instance, reached out to Peretz by email and wrote:

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.

Alifraghis followed this email with a similar one to Competitor A. Later, Peretz responded to Alifraghis: "We are open to what you suggest ... and are willing to pull the trigger on this at midnight Sunday, August 11th." The discussion continued, but failed to reach an agreement. It ended in January 2014 when the respondents learned of the FTC's investigation. Competitor A did not respond to any emails from Peretz or Alifraghis.

The FTC's complaint charged Alifraghis and Peretz, as well as their respective companies, with violating Section 5 of the FTC Act by inviting certain competitors in the sale of barcodes to join together in a



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collusive scheme to raise prices. An “invitation to collude,” which, if accepted, would constitute a per se violation of the Sherman Act has long been considered a violation of Section 5.

## **Remedy**

Under the terms of the settlement, the respondents are required to cease and desist from communicating with their competitors about rates or prices. They also are barred from entering into, participating in, inviting or soliciting an agreement with any competitor to divide markets, allocate customers or to fix prices. Further, the settlement puts the respondents under certain FTC reporting and compliance requirements for 20 years.

## **Analysis**

While the penalties agreed to by the respondents may not seem burdensome, if the invitation had been accepted and the competitors had reached an agreement, the FTC would have referred the matter to the U.S. Department of Justice, Antitrust Division for a criminal investigation. In the event the DOJ found evidence of an agreement, it could have sought monetary penalties or prison time.

There are a number of reasons that the FTC would challenge conduct under an invitation to collude theory of harm. First, it may be difficult to prove an actual agreement to fix prices or allocate customers. In the event there is strong evidence of at least a solicitation, an invitation to collude challenge allows the FTC to impose some penalty without having to prove an agreement. Second, an invitation to collude may facilitate coordinated interaction by signaling the solicitor’s intentions. Finally, the FTC simply may seek to deter conduct that otherwise serves no legitimate business purpose.

The online barcode resellers cases provide a helpful reminder that companies should be wary when communicating with competitors. Generally, companies should avoid any communication with competitors regarding price, quantity or future plans. If a company is the recipient of such a communication, it should not respond without consulting counsel. One option may be to send an unequivocal rejection of the invitation. A second option, and possibly the one chosen by Competitor A, would be to stay silent and forward the invitation to the antitrust authorities.

Although the FTC does not say how it uncovered the communications at issue here, it may be that Competitor A provided the FTC with the offending correspondence. By providing evidence to the FTC, Competitor A likely avoided any inference of wrongdoing. A company in a similar position has no obligation to turn over evidence of an “invitation to collude” but in some circumstances, it may be the best course of action.

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