

FEDERAL TRADE COMMISSION

Consumer Benefits and Harms: Distinguishing Resale Price Maintenance that Benefits Consumers From Resale Price Maintenance that Harms Consumers

AGENCY: Federal Trade Commission.

ACTION: Notice of Public Workshops and Opportunity for Comment.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) will hold a series of public Workshop sessions at one or more locations to explore how best to distinguish between uses of resale price maintenance (RPM)¹ that benefit consumers and those that do not, for purposes of enforcing Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (hereinafter “Sections 1 and 5”). Among other things, the Workshops will examine when and whether particular market facts or conditions make it more or less likely that the use of RPM will be procompetitive or neutral, and when or whether RPM may harm competition and consumers.

The FTC expects to focus on legal doctrines and jurisprudence, economic research (both theoretical and empirical), as well as business and consumer experiences. The FTC is soliciting public comment from lawyers, economists, marketing professionals, the business community, consumers groups, law enforcement officials, academics (including business and economic historians), and all other interested persons on three general subjects:

¹ RPM is typically an agreement between a manufacturer and retailer setting the prices at which the retailer will resell the manufacturer’s goods to consumers. If the agreement requires the retailer to sell only at or above the price established by the manufacturer, it is said to be minimum RPM. Conversely, if the agreement requires the retailer to sell only at or below the price directed by the manufacturer, it is said to be maximum RPM. Thomas K. McCaw, *Competition and “Fair Trade”*: History and Theory, 16 RES. IN ECON. THEORY 185, 186 (1996).

- (1) The legal, economic, and management principles relevant to the application of Sections 1 and 5 to RPM, including the administrability of current or potential antitrust or other rules for the application of these laws;
- (2) The business circumstances regarding the use of RPM that the FTC should examine in the upcoming Workshops, including examples of actual conduct; and
- (3) Empirical economic studies or analyses that might provide better guidance and assistance to the business and legal communities regarding RPM enforcement issues.

With respect to the request for examples of real-world conduct, the FTC is soliciting discussions of the business reasons for, and the actual or likely competitive effects of, the use of RPM, including actual or likely efficiencies, as well as the theoretical underpinnings for whether the conduct had or has pro- or anticompetitive effects. When each individual Workshop session is announced, the FTC will solicit additional submissions regarding the topics to be covered at that particular session.

The FTC encourages submissions from businesses or business consultants from a variety of unregulated and regulated markets, recognizing that market participants can offer unique insights into how RPM affects competition, and that the effects of RPM may differ depending on industry context and market structure. The FTC seeks this practical input to provide a real-world foundation of knowledge upon which to draw as the Workshops progress. Respondents are encouraged to respond on the basis of their actual experiences.

The goal of these Workshops is to promote dialogue, learning, and consensus building among all interested parties with respect to the analysis of RPM under Sections 1 and 5, both for purposes of law enforcement and to provide practical guidance to businesses with respect to

antitrust compliance. The FTC plans to hold four to six half-day Workshop sessions between January and March 2009. The FTC plans to publish a more detailed description of the topics to be discussed before each session and to solicit additional submissions about each topic. The sessions will be transcribed and placed on the public record. Any written comments received also will be placed on the public record. After the conclusion of the Workshops, the Commission may prepare a public report that incorporates the findings of the Workshops, as well as a description of other research that might be undertaken by the Commission or others..

DATES: Any interested person may submit written comments responsive to any of the topics addressed in this **Federal Register Notice**. Respondents are encouraged to provide comments and requests to participate in the workshops as soon as possible, but in any event no later than the final Workshop session. However, to assist the FTC in planning the Workshop sessions, respondents are encouraged to provide initial comments regarding the three general questions raised in the Summary above, as well as requests to participate in the workshops, to the FTC on or before December 12, 2008.

ADDRESS: Interested parties are invited to submit written comments or requests to participate in the public workshop electronically or in paper form. Comments and requests should refer to “Resale Price Maintenance Workshop, P090400” to facilitate their organization. Please note that comments will be placed on the public record of this proceeding -- including on the publicly accessible FTC website, at <http://www.ftc.gov/os/publiccomments.shtm> -- and therefore should not include any sensitive or confidential information. In particular, comments and requests should not include any sensitive personal information, such as an individual’s Social Security Number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number.

Comments and requests also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments and requests should not include any “[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential. . . .,” as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2) (2008). Comments and requests containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c).²

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments and requests in electronic form.

Comments filed in electronic form should be submitted by using the following weblink:

<https://secure.commentworks.com/ftc-resalepricemaintenanceworkshop/> (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink:

<https://secure.commentworks.com/ftc-resalepricemaintenanceworkshop/>. Additionally, you may inform the FTC of your desire to participate in the Workshop by emailing information regarding your interest in participation, as well as the issue(s) you might wish to address, to the FTC at rpmworkshop@ftc.gov. You may also visit the FTC website at <http://www.ftc.gov> to read the Notice and the news release describing it.

² FTC Rule 4.2(d), 16 CFR 4.2(d). The comment or request must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment or request to be withheld from the public record. The request for confidential treatment will be granted or denied by the Commission’s General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c) (2008).

A comment or request filed in paper form should include the reference to “Resale Price Maintenance Workshop, P090400” both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-135 (Annex R), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act (“FTC Act”) and other laws the Commission administers permit the collection of public comments and requests to participate to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments and requests that it receives, whether filed in paper or electronic form. Comments and requests received will be available to the public on the FTC website, to the extent practicable, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments and requests to participate it receives before placing them on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy, at <http://www.ftc.gov/ftc/privacy.shtm>.

The workshop will be open to the public, and there is no fee for attendance. For admittance to the building, all attendees will be required to show a valid photo identification, such as a driver’s license. Pre-registration is not required for attendees, but persons desiring to participate as panelists must submit a request to participate and file a comment. Members of the public and press who cannot attend in person may view a live webcast of the workshop on the

FTC's website. The workshop will be transcribed, and the transcript will be placed on the public record.

The workshop venue will be accessible to persons with disabilities. If you need an accommodation related to a disability, call Carrie McGlothlin at (202) 326-3388. Such requests should include a detailed description of the accommodations needed and a way to contact you if we need more information. Please provide advance notice of any needs for such accommodations.

FOR FURTHER INFORMATION CONTACT: James C. Cooper, Deputy Director, Office of Policy Planning, 600 Pennsylvania Ave., N.W., Washington, DC 20580, telephone 202-326-3367, or John Yun, Staff Economist, Antitrust I Division, Bureau of Economics, 600 Pennsylvania Ave., N.W., Washington, DC 20580, telephone 202-326-2433; or by email at rpmworkshop@ftc.gov. Detailed agendas for the Workshops will be available on the FTC Home Page (<http://www.ftc.gov>).

SUPPLEMENTARY INFORMATION: Section 1 of the Sherman Act condemns “every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade and commerce among the several States, or with foreign nations,”³ which includes violations of the Sherman Act.⁴ Although the FTC does not directly enforce Section 1 of the Sherman Act, Section 5 of the FTC Act condemns “unfair methods of competition in or affecting commerce,

³ 15 U.S.C. § 1.

⁴ See *Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953) (stating that Section 5 of the FTC Act “condemn[s] as ‘unfair methods of competition’ existing violations of “ the Sherman and Clayton Acts).

and unfair or deceptive acts or practices in or affecting commerce.”⁵ In 1911, two U.S. Supreme Court decisions held, respectively, that RPM agreements were illegal as a matter of law (*Dr. Miles*);⁶ and that Section 1 of the Sherman Act prohibited restraints of trade that are “unreasonably restrictive of competitive conditions” (*Standard Oil*).⁷ Except to the extent that RPM was exempted from federal antitrust liability by the Fair Trade Laws from 1937 to 1975,⁸ minimum RPM was treated as *per se* illegal under the antitrust laws until the Supreme Court decided the *Leegin*⁹ case in June 2007.¹⁰

Leegin overruled the *Dr. Miles* decision, finding that the Court’s more recent decisions were inconsistent with rationales upon which *Dr. Miles* was based.¹¹ The Court directed that the legality of minimum RPM would be determined under the rule of reason; however, the Court did not specify the contours of the rule of reason analysis that would be necessary or appropriate in all cases. Rather, it observed that:

As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from

⁵ 15 U.S.C. § 45

⁶ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Subsequent cases referred to RPM as being *per se* illegal.

⁷ *Standard Oil of New Jersey v. United States*, 221 U.S. 1, 58 (1911)

⁸ McCraw, *supra* note 1, at 187.

⁹ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

¹⁰ The Supreme Court subjected maximum RPM to the rule of reason in 1997. *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

¹¹ *Id.* at 2712-25 (citing, *inter alia*, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (“*GTE Sylvania*”); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); and *State Oil Co. v. Khan*, 522 U.S. 3 (1997)).

the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote competitive ones.

Id. at 2720.

In the *Nine West* matter,¹² the Commission recently confronted the Court’s lack of specificity, as follows:

As it abandoned the *per se* prohibition of *Dr. Miles*, the Court cautioned that it was not declaring RPM to be *per se* legal. *Leegin* summarized some of the possible procompetitive and anticompetitive consequences of resale price maintenance. The Court explained that RPM might stimulate interbrand competition and have a procompetitive effect on competition, so that RPM does not meet the *per se* illegality standard of a practice that “always or almost always tends to restrict competition and decrease output.” At the same time, after reviewing the potential anticompetitive effects of RPM, the Court said, “[a]s should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.” In light of these potential adverse effects, the Court further observed that “[i]f the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market.”

The Court’s comments about the possible harms of RPM, and its caution to lower courts “to be diligent in eliminating their anticompetitive uses from the market,” can usefully be understood in the context of the debate between the *Leegin* majority and the dissent about the wisdom of abandoning the *per se* ban of *Dr. Miles*. The dissent argued that the majority had slighted the potential anticompetitive consequences of RPM. The majority’s recitation of examples of some of the possible competitive harms and its call for “diligent” efforts by the lower courts to be attentive to these harms can be seen as an attempt to provide assurances that the Court foresaw a useful role for continued antitrust scrutiny of RPM.

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¹² *Nine West Group, Inc.*, Docket No. C-3937 (Apr. 11, 2000), Order Granting In Part Petition to Reopen and Modify Order Issued April 11, 2000 (May 6, 2008), available at: <http://www.ftc.gov/os/caselist/9810386/080506order.pdf>.

At this early stage of the application of *Leegin* by the lower courts and the Commission, the *Leegin* factors can serve as helpful guides to begin an assessment of when RPM deserves closer scrutiny. Through the Commission's own enforcement work, research, and external consultations such as workshops, we anticipate further refinements to this analysis, including the further specification of scenarios in which RPM poses potential hazards and those in which it does not.

Nine West, supra n. 11 at 9-14 (citations omitted).

By holding these Workshops, the FTC hopes to identify the market facts, circumstances, and conditions under which the use of RPM is likely to be procompetitive or benign, as opposed to anticompetitive and harmful to consumers. The Commission believes that an appropriate antitrust approach to RPM requires the means for distinguishing permissible from impermissible conduct in varied circumstances. Moreover, those means should provide reasonable guidance to businesses attempting to evaluate the legality of proposed conduct before undertaking it. The development of clear standards that both protect consumers and enable businesses to adopt strategies that comply with the antitrust laws presents some of the most complex issues facing the Commission, the courts, and the antitrust bar.

Given this challenge – and because antitrust analysis must reflect the particular market facts and circumstances within which a restraint has been adopted – the FTC encourages commenters to describe actual examples of RPM that the FTC should consider in the context of the Workshop, discuss the business reasons for the conduct, and the actual or likely competitive effects of the conduct.

Illustrative Questions for Consideration With Respect to the RPM Usages That the Commenter Discusses. Commenters should indicate whether responses would change if the conduct is an express RPM agreement or an RPM arrangement that achieves its outcome under a *Colgate*

policy.¹³ Commenters should also indicate whether responses would differ if the arrangement were directed toward different industry levels (e.g., retail, wholesale, or manufacturer).

1. How should the structure of the market and the market shares of participants be taken into account in analyzing RPM?
2. Are there other specific market facts or circumstances that might have an impact on the likely competitive effects of RPM under the circumstances described?
Without limiting the scope of this question, commenters are specifically invited to comment on the effect on marginal and inframarginal consumers.
3. What are the business reasons (e.g., management, marketing, financial, etc.) for the use of RPM? Are there alternative business strategies available to achieve the same results? What factors, including any cost savings, entered the decision to use RPM to achieve the desired result?
4. To what extent does uncertainty regarding the legality of RPM under state law affect the decision to use RPM?
5. What are the likely procompetitive and anticompetitive effects of RPM under the circumstances described?

¹³ A manufacturer uses a *Colgate* policy when it does not ask retailers for any agreement regarding resale prices; rather, the manufacturer announces in advance that it will only sell its products to retailers that resell those products at or above the prices it specifies, and then enforces the policy by deciding unilaterally that it will refuse to make any future sales of its products to any retailer who has violated its pricing policies. These arrangements take their name from the Supreme Court's decision in *United States v. Colgate & Co.*, 250 U.S. 300, 307-8 (1919) (distinguishing *Dr. Miles* on the ground that the "unlawful combination [in that case] was effected through contracts which undertook to prevent dealers from freely exercising the right to sell").

6. What strategies might competitors use to respond to a loss of sales to a firm that uses RPM?
7. Under what market conditions is the use of RPM likely either to promote or hinder market entry by other manufacturers or retailers?
8. Are there industries where the use of RPM is prominent?
9. Are there any original theoretical, analytical or empirical studies on the nature or competitive effects of RPM or alternatives to RPM that should be brought to the attention of the Commission?
10. What tests or standards should courts or enforcement agencies use in assessing whether particular conduct violates Sections 1 or 5? Commenters are specifically requested to assess whether the test or standard applicable to a particular usage of RPM might vary based on particular market facts or circumstances. Additionally, are there particular market facts and circumstances where the approach established by the Court of Appeals for the District of Columbia Circuit in *Polygram Holding, Inc. v. Fed. Trade Comm'n*, 416 F. 3d (D.C. Cir. 2005), would or would not be appropriate?

By direction of the Commission.

Donald S. Clark
Secretary