

useful role for continued antitrust scrutiny of RPM.

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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

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

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?

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?

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").

By direction of the Commission.

Donald S. Clark,

Secretary.

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GENERAL SERVICES ADMINISTRATION

Multiple Award Schedule Advisory Panel; Notification of Public Advisory Panel Meeting/SUBJECT≤

AGENCY: U.S. General Services Administration (GSA).

ACTION: Notice.

SUMMARY: The U.S. General Services Administration's (GSA) Multiple Award Schedule Advisory Panel (MAS Panel), a Federal Advisory Committee, meeting scheduled for October 27, 2008 was cancelled.

Dated: October 30, 2008.

David A. Drabkin,

Deputy Chief Acquisition Officer, Office of the Chief Acquisition Officer, General Services Administration.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute for Occupational Safety and Health; Decision To Evaluate a Petition To Designate a Class of Employees at the Linde Ceramics Plant, Tonawanda, NY, To Be Included in the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees at the Linde Ceramics Plant, Tonawanda, New York, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: Linde Ceramics Plant.

Location: Tonawanda, New York.

Job Titles and/or Job Duties: All employees.