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Wisconsin. Tw T\*1c Racine,

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Avenue NW, Washington, DC 20580,

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<sup>1</sup> In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c), 16 CFR 4.9(c).

## II. Legal Analysis

The January and June 2008 price restraints among Star, McWane, and Sigma alleged in the complaint are naked restraints on competition that are unlawful.<sup>2</sup>

The June 2008 agreement, which was allegedly reached after a public invitation to collude by McWane, illustrates how price fixing agreements may be reached in public. Here, McWane's invitation to collude was conveyed in a letter sent to waterworks distributors, the common customers of Star, McWane, and Sigma. McWane's letter contained a section that was meaningless to waterworks distributors, but was intended to inform Star and Sigma of the terms on which McWane desired to fix prices.<sup>3</sup>

The DIFRA information exchange was a component of the illegal price fixing agreement. Specifically, the complaint alleges that the DIFRA information exchange played a critical role in the 2008 price fixing conspiracy, first as the for a price increase by McWane in June 2008, and then by enabling Star, McWane, and Sigma to monitor each others' adherence to the collusive arrangement through the second half of 2008.

Evaluated apart from the price fixing conspiracy, Star's participation in the information exchange is an independent violation of the antitrust laws because this concerted action facilitated price coordination among the three competitors.<sup>4</sup>

<sup>2</sup> Federal Trade Commission & United States Department of Justice, Antitrust Guidelines for Collaboration Among Competitors ("Competitor Collaboration Guidelines") § 1.2 (2000); 140 F.T.C. 715, 729 (2005) ("We do not believe that the per se condemnation of naked restraints has been affected by anything said either in P...").

<sup>3</sup> Because McWane's communication informed its rivals of the terms of price coordination desired by McWane without containing any information for customers, this communication had no legitimate business justification. 906 F.2d 432, 448 (9th Cir. 1990) (public communications may form the basis of an agreement on price levels when "the public dissemination of such information served little purpose other than to facilitate interdependent or collusive price coordination").

<sup>4</sup> The Commission articulated a safe harbor for exchanges of price and cost information in Statement 6 of the 1996 Health Care Guidelines. Dep't of Justice & Federal Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care, Statement 6: Enforcement Policy on Provider Participation in Exchanges of Price and Cost Information (1996). The DIFRA information exchange failed to qualify for the safety zone of the Health Care Guidelines for several reasons. Although the DIFRA information exchange was managed by a third party, the information exchanged was insufficiently historical, the participants in the exchange too few, and their individual market shares too large to qualify for the

## III. The Proposed Order

The proposed order is designed to remedy the unlawful conduct charged against Star in the complaint and to prevent the recurrence of such conduct.

Paragraph II.A of the proposed order prohibits Star from participating in or maintaining any combination or conspiracy between any competitors to fix, raise or stabilize the prices at which DIPF are sold in the United States, or to allocate or divide markets, customers, or business opportunities.

Paragraph II.B of the proposed order prohibits Star from soliciting or inviting any competitor to participate in any of the actions prohibited in Paragraphs II.A.

Paragraph II.C of the proposed order prohibits Star from participating in or facilitating any agreement between competitors to exchange "Competitively Sensitive Information" ("CSI"), defined as certain types of information related to the cost, price, output or customers of or for DIPF. Paragraph II.D of the proposed order prohibits Star from unilaterally disclosing CSI to a competitor, except as part of the negotiation of a joint venture, license or acquisition, or in certain other specified circumstances. Paragraph II.E of the proposed order prohibits Star from attempting to engage in any of the activities prohibited by Paragraphs II.A, II.B, II.C, or II.D.

The prohibitions on Star's communication of CSI with competitors contained in Paragraphs II.C and II.D of the proposed order are subject to a proviso that permits Star to communicate CSI to its competitors under certain circumstances. Under the proposed order, Star may participate in an information exchange with its competitors in the DIPF market provided that the information exchange is structured in such a way as to minimize the risk that it will facilitate collusion among Star and its competitors. Specifically, the proposed order requires any exchange of CSI to occur no more than twice yearly, and to involve the exchange of aggregated information more than six months old. In addition, the aggregated information that is exchanged must be made publicly available, which increases the likelihood that an information exchange involving Star will simultaneously benefit consumers. The proposed order also prohibits Star's participation in an

permissive treatment contemplated by the Health Care Guidelines. While failing to qualify for the safety zone of the Health Care Guidelines is not in itself a violation of Section 5, firms that wish to minimize the risk of antitrust scrutiny should consider structuring their collaborations in accordance with the criteria of the safety zone.

exchange of CSI involving price, cost or total unit cost of or for DIPF when the individual or collective market shares of the competitors seeking to participate in an information exchange exceed specified thresholds. The rationale for this provision is that in a highly concentrated market the risk that the information exchange may facilitate collusion is high. Due to the highly concentrated state of the DIPF market as currently structured, an information exchange involving Star and relating to price, output or total unit cost of or for DIPF is unlikely to reoccur in the foreseeable future.

Paragraph III of the proposed order requires Star to cooperate with Commission staff in the still-pending administrative litigation against McWane.

The proposed order has a term of 20 years.

By direction of the Commission.

**Donald S. Clark,**

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## GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090-0262; Docket 2012-0001; Sequence 3]

### General Services Administration Acquisition Regulation; Information Collection; Identification of Products With Environmental Attributes

**AGENCY:** Office of Acquisition Policy, GSA.

**ACTION:** Notice of request for comments regarding an extension of a previously existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding identification of products with environmental attributes.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

**DATES:** Submit comments on or before: May 25, 2012.