

## 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 *per se* 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 *quid pro quo* 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); *In re North Texas Specialty Physicians*, 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 *California Dental or Polygram*").

<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. See *In re Petroleum Products Antitrust Litig.*, 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. See 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 DIFP 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 DIFP. 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 DIFP 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 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 DIFP 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 DIFP market as currently structured, an information exchange involving Star and relating to price, output or total unit cost of or for DIFP 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,**

*Secretary.*

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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 a 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.

**FOR FURTHER INFORMATION CONTACT:** Ms. Dana Munson, Procurement Analyst, General Services Acquisition Policy Division, GSA, at telephone (202) 357-9652 or via email to [dana.munson@gsa.gov](mailto:dana.munson@gsa.gov).

**ADDRESSES:** Submit comments identified by Information Collection 3090-0262, Identification of Products with Environmental Attributes, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "Information Collection 3090-0262, Identification of Products with Environmental Attributes", under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "Information Collection 3090-0262, Identification of Products with Environmental Attributes". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 3090-0262, Identification of Products with Environmental Attributes" on your attached document.

- *Fax:* 202-501-4067.
- *Mail:* General Services

Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. Attn: Hada Flowers/IC 3090-0262, Identification of Products with Environmental Attributes.

*Instructions:* Please submit comments only and cite Information Collection 3090-0262, Identification of Products with Environmental Attributes, in all correspondence related to this collection. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Purpose**

General Services Administration (GSA) requires contractors submitting Multiple Award Schedule Contracts to identify in their GSA price lists those products that they market commercially that have environmental attributes. The identification of these products will enable Federal agencies to maximize the use of these products to meet the responsibilities expressed in statutes and executive orders.

##### **B. Annual Reporting Burden**

*Respondents:* 9,000.  
*Responses per Respondent:* 1.  
*Annual Responses:* 9,000.  
*Hours per Response:* 3.

*Total Burden Hours:* 27,000.

#### *Obtaining Copies of Proposals:*

Requesters may obtain a copy of the information collection documents from the Regulatory Secretariat Division (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501-4755. Please cite OMB Control No. 3090-0262, Identification of Products with Environmental Attributes, in all correspondence.

Dated: March 19, 2012.

**Joseph A. Neurauter,**

*Director, Office of Acquisition Policy, Senior Procurement Executive.*

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## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Administration on Aging**

#### **Agency Information Collection Activities; Submission for OMB Review; Comment Request; State Annual Long-Term Care Ombudsman Report and Instructions**

**AGENCY:** Administration on Aging, HHS.

**ACTION:** Notice.

**SUMMARY:** The Administration on Aging (AoA) is announcing that the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Submit written comments on the collection of information by April 25, 2012.

**ADDRESSES:** Submit written comments on the collection of information by fax 202.395.6974 or by mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW., Rm. 10235, Washington, DC 20503, Attn: Brenda Aguilar, Desk Officer for AoA.

**FOR FURTHER INFORMATION CONTACT:** Louise Ryan, telephone: (202) 357-3503; email: [louise.ryan@aoa.hhs.gov](mailto:louise.ryan@aoa.hhs.gov).

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, AoA has submitted the following proposed collection of information to OMB for review and clearance.

States provide the following data and narrative information in the report:

1. Numbers and descriptions of cases filed and complaints made on behalf of long-term care facility residents to the statewide ombudsman program;
2. Major issues identified impacting on the quality of care and life of long-term care facility residents;

3. Statewide program operations; and
4. Ombudsman activities in addition to complaint investigation.

The report form and instructions have been in continuous use, with minor modifications, since they were first approved by OMB for the FY 1995 reporting period. This request is for approval to extend use of the current form and instructions, with no modifications, for three years, covering the FY 2012-2014 reporting periods.

The data collected on complaints filed with ombudsman programs and narrative on long-term care issues provide information to Centers for Medicare and Medicaid Services and others on patterns of concerns and major long-term care issues affecting residents of long-term care facilities. Both the complaint and program data collected assist the states and local ombudsman programs in planning strategies and activities, providing training and technical assistance and developing performance measures.

A reporting form and instructions may be viewed in the ombudsman section of the AoA Web site, [www.aoa.gov](http://www.aoa.gov).

AoA estimates the burden of this collection and entering the report information as follows: Approximately 8,569 hours, with 52 State Agencies on Aging responding annually.

Dated: March 2, 2012.

**Kathy Greenlee,**

*Assistant Secretary for Aging.*

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## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Food and Drug Administration**

[Docket No. FDA-2011-N-0624]

#### **Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Notice of Participation**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by April 25, 2012.