TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 012097 AND 013197—Continued

Name of acquiring person; name of acquired person; name of acquired entity	PMN No.	Date terminated
Mr. Steven P. Jobs, Apple Computer, Inc., Apple Computer, Inc.,	97–1011	01/28/97
Apple Computer, Inc., Steven P. Jobs, NeXT Software, Inc.	97–1012	01/28/97
Code, Hennessy & Simmons II, L.P., Rand McNally & Company, DocuSystems Division	97–1020	01/28/97
Leonard Riggio, Barnes & Noble, Inc., Barnes & Noble, Inc.	97–1029	01/28/97
Potomac Electric Power Company, Baltimore Gas and Electric Company, 1Baltimore Gas and Electric Company	96–1879	01/29/97
Baltimore Gas and Electric Company, Potomac Electric Power Company, Potomac Electric Power Company	96–1880	01/29/97
Tenet Healthcare Corporation, OrNda Healthcorp., OrNda Healthcorp.	97–0309	01/29/97
Evening Post Publishing Company, Post Publishing Company, Post Publishing Company	97–0969	01/30/97
William L. Sauder, Ronald Cholette, Can-Am Millwork, Ltd.	97–0987	01/30/97
Paul Goldner, American Business Information, Inc., American Business Information, Inc.	97–1000	01/30/97
Broderbund Software, Inc., Advanced Voting Trust, of Samuel I. Newhouse, Living Books	97–1007	01/30/97
BankAmerica Corporation, Homeside, Inc., Honolulu Mortgage Company	97–1017	01/30/97
United Auto Group, Inc., Kevin J. Coffey, Crown Jeep Eagle, Inc.	97–1024	01/30/97
Automatic Data Processing, Inc., HealthPlan Services Corporation, HealthPlan Services Corporation	97–1027	01/30/97
Payless ShoeSource, Inc., J. Baker, Inc., JBI, Inc., Parade of Shoes Division	97–1042	01/30/97
Philip Environmental Inc., Gil Mains, Sr., RMF Global, Inc.	97–0982	01/31/97
Primark Corporation, Information Partners Capital Fund, LP, WEFA Holdings, Inc.	97–1008	01/31/97
Cable and Wireless plc, Cable and Wireless Communications plc (Joint Venture), Cable and Wireless Communications plc (Joint Venture)	97–1034	01/31/97
NYNEX Corporation,.		
Cable and Wireless Communications plc (Joint Venture), Cable and Wireless Communications plc (Joint Venture)	97–1035	01/31/97
Metropolitan Life Insurance Company, Andrew Goldfarb, HCC Industries, Inc.	97–1037	01/31/97
Kenneth R. Thomson, Thomas L. Thomas, Creative Solutions, Inc	97–1043	01/31/97
Irish Life plc, GR Holding Company, Inc., Guarantee Reserve Life Insurance Co.	97–1061	01/31/97
Supervalu Inc., Kerry Smith, Signature Mondial, Inc.	97–1062	01/31/97
Handy & Harman, Saugatuck Capital Company Limited Partnership III, Olympic Manufacturing Group, Inc.	97–1072	01/31/97
AMF Holdings Inc., American Recreation Centers, Inc., American Recreation Centers, Inc.	97–1077	01/31/97

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay or Parcellena P. Fielding, Contact Representatives, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room 303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 97–3340 Filed 2–10–97; 8:45 am]

BILLING CODE 6750–01–M

[File No. 951–0106]

American Cyanamid Company; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair or deceptive acts or practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, the Parsipanny, New Jersey-based company from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for its products, or from otherwise agreeing with its dealers to control or maintain resale prices. The complaint accompanying the consent agreement alleges that the company violated antitrust laws by fixing the resale prices of its agricultural chemical products.

DATES: Comments must be received on or before April 14, 1997.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: William J. Baer, Federal Trade Commission, H–374, 6th and Pennsylvania Ave, NW., Washington, DC 20580. (202) 326–2932. Mark Whitener, Federal Trade Commission, H–374, 6th and Pennsylvania Ave, NW., Washington, DC 20580. (202) 326–2845. Michael E. Antalics, Federal Trade Commission, S–2627, 6th and Pennsylvania Ave, NW, Washington, DC 20580. (202) 326–2821.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46, and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the accompanying complaint. An electronic copy of the full text of the consent agreement package can be obtained from the Commission Actions sections of the FTC Home Page (for January 30, 1997), on the World Wide Web, at ''http://www.ftc.gov/os/actions/htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room H–130, Sixth Street and Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–3627. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis To Aid Public Comment on the Proposed Consent Order

The Federal Trade Commission (''the Commission'') has accepted an agreement to a proposed consent order from American Home Products Corporation (''AHP''), through its wholly-owned subsidiary, American Cyanamid Company (''American Cyanamid''), located in Parsippany, New Jersey. The agreement would settle charges by the Commission that

American Cyanamid violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted completion in the domestic markets for crop protection chemicals, which are herbicides and insecticides widely used in commercial agriculture.

The proposed consent order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The purpose of this analysis is to invite public comment concerning the consent order and any other aspect of American Cyanamid's alleged anticompetitive conduct relating to its C.R.O.P. and A.P.E.X. rebate programs. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify its terms in any way.

The Complaint

The complaint prepared for issuance by the Commission along with the proposed order alleges that American Cyanamid has engaged in acts and practices that have unreasonably restrained competition in the sale and distribution of crop protection chemicals in the United States. In 1995, the Commission's proposed complaint alleges, American Cyanamid sold at retail more than $1 billion of its crop protection chemicals and was the market share leader in three domestic crop protection chemical markets: soybean broadleaf herbicides, soybean grass herbicides, and corn soil insecticides, as well as being the second-largest domestic producer of cotton grass herbicides.

According to the complaint, American Cyanamid operated two cash rebate programs for its retail dealers for approximately five years. From 1989–1992, the plan was called the ''Cash Reward on Performance'' (''C.R.O.P.'') program, and was renamed the ''Award for Performance Excellence'' (''A.P.E.X.'') program in late 1992 through August 1995. The complaint states that American Cyanamid entered into written agreements with its dealers under these programs, pursuant to which American Cyanamid offered to pay its dealers substantial rebates on each sale of its crop protection chemicals that was made at or above specified minimum resale prices. According to the complaint, the dealers overwhelmingly accepted American Cyanamid's rebate offer by selling at or above the specified minimum resale prices.

The complaint further alleges that the wholesale prices in the agreements were set at a level equal to the specified minimum resale prices, and because a dealer received no rebate on sales below the specified prices, those sales were made at a loss to the dealer.

The complaint further states that although American Cyanamid included certain non-price performance criteria in its rebate programs that could increase the amount of the rebate, a dealer's compliance with these performance criteria was neither necessary nor, by itself, sufficient to obtain rebates. As examples, the complaint alleges that if a dealer met all of American Cyanamid's performance criteria, but sold the product for less than American Cyanamid's specified minimum resale price, that dealer received no rebate on the sale. On the other hand, if the dealer met none of the performance criteria, but sold the product at or above American Cyanamid's specified minimum resale price, the dealer nonetheless received a rebate on that sale.

American Cyanamid's conditioning of financial payments on dealers' charging a specified minimum price amounted to the *quid pro quo* of an agreement on resale prices. In cases where this issue has arisen, both before and after the Supreme Court examined the *per se* rule against resale price maintenance in *Monsanto* and *Sharp,*[1] courts have treated such agreements as *per se* illegal. *See Lehman* v. *Gulf Oil Corp.*, 464 F.2d 26, 39, 40 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972) (stating that '' * * * adherence to a suggested price schedule was the *quid pro quo* for Lehrman's receiving Gulf's TCAs [temporary competitive allowances]'' and ''there is no comparable justification for conditioning wholesale price support upon adherence to a schedule of *minimum* retail prices.'' (emphasis in original)); *Butera* v. *Sun Oil Co., Inc.* 496 F.2d 434, 437 (1st Cir. 1974). By offering financial inducements in return for selling at specified minimum prices, a manufacturer seeks the ''acquiescence or agreement'' of its dealers in a resale price-fixing scheme. *Monsanto*, 465 U.S. at 764 n. 9. The dealer, in turn, accepts the manufacturer's offer by selling at or above the specified minimum prices. *See* Isaksen v. *Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (Posner, J.) (an ''obvious'' resale price-fixing agreement is found '' * * * if [the manufacturer] had told [the dealer] that it would reduce its wholesale price to him if he raised his retail price, and [the dealer] had accepted the offer by raising his price.''). See also Khan v. *State Oil Co.*, 93 F.3d 1358, 1360–61 (7th Cir. 1996) (Posner, J.), *petition for cert. pending* No. 96–871 (agreement on price found where dealership agreement on its face allowed dealer to charge any resale price it wished, but distributor tied financial consequences to dealers' not charging the resale prices it suggested). As a result, incentives to reduce price below the specified level were substantially affected by American Cyanamid's rebate scheme.

The rebate programs challenged in this case are unlike situations where manufacturers are permitted to condition a discount or other incentive on that discount being ''passed through'' to consumers, which prevents a dealer form simply ''pocketing'' the discount. In these types of cases, the dealer is free to sell at even lower prices than the amount of the direct ''pass through'' of the discount or other incentive. Discounts cannot be conditioned, therefore, on the dealers' adherence to specified minimum price. *See* AAA Liquors, Inc. v. *Joseph E. Seagram and Sons, Inc.*, 705 F.2d 1203, 1206 (10th Cir. 1982), *cert denied*, 461 U.S. 919 (183) (Seagram's requirement of passing through its discount ''[did] not prohibit the wholesaler from making greater reductions in price that the discount provides.'') *See also* Acquaire v. *Canada Dry Bottling Co.*, 24 F.3d 401, 409–10 (2d Cir. 1994); *Lewis Service Center, Inc.* v. *Mack Trucks, Inc.*, 714 F.2d 842, 845–47 (8th Cir. 1983) (because dealers could discount more than Mack's sales assistance, the court found that ''the purpose of Mack's discount program [was] not to force adherence to any particular price scheme of Mack's.'').

The Proposed Consent Order

Part I of the proposed order covers definitions. These definitions make clear that the consent order applies to the directors, officers, employees, agents and representatives of American Cyanamid. The order also defines the terms product, dealer and resale price.

Part II of the order contains two major operative provisions: Part II(A) deals with the specific conduct at issue in this case. It prohibits American Cyanamid from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for its products. Part II(B) prevents American Cyanamid from otherwise agreeing with its dealers generally to control or maintain resale prices.

[1] *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

Neither of these provisions should be construed to prohibit lawful cooperative advertising programs or ''pass through'' discount programs that are not otherwise part of an unlawful resale price maintenance scheme. The Commission has previously determined that order provisions prohibiting agreements on resale prices do not restrict a company's ability to implement otherwise lawful cooperative advertising and ''pass through'' rebate plans because such programs do not, in themselves, constitute agreements on resale prices. See, e.g., *In Re Magnavox Co.*, 113 F.T.C. 255, 263, 269–70 (1990).

Part III of the order requires that for a period of three (3) years from the date on which the order becomes final, American Cyanamid shall include a statement, posted clearly and conspicuously, on any price list, advertising, catalogue or other promotional material where it has suggested a resale price for any product to any dealer. The required statement explains that while American Cyanamid may suggest resale prices for its products, dealers remain free to determine on their own the prices at which they will sell American Cyanamid's products.

Part IV of the order requires that for a period of three (3) years from the date on which the order becomes final, American Cyanamid shall mail the letter attached to the order as Exhibit A and a copy of this order to all of its current dealers, distributors, officers, management employees, and agents or representatives with sale or policy responsibilities for American Cyanamid's products. American Cyanamid also must mail the letter and order to any new dealer, distributor or employee in the above positions within thirty (30) days after the commencement of that person's affiliation or employment with American Cyanamid. All of the above dealers, distributors and employees must sign and return a statement to American Cyanamid within thirty (30) days of receipt that acknowledges they have read the order and that they understand that non-compliance with the order may subject American Cyanamid to penalties for violation of the order.

Part V of the order requires that American Cyanamid file with the Commission an annual verified written report giving the details of the manner and form in which American Cyanamid is complying and has complied with the order. In addition, Part V of the order also requires American Cyanamid to maintain and make available to the Commission upon reasonable notice all records of communications with dealers, distributors, and agents or representatives relating to sale prices in the United States, as well as records of any action taken in connection with activities covered by the rest of the order. Finally, American Cyanamid must inform the Commission at least thirty (30) days before any proposed changes in the corporation, such as dissolution or sale.

Donald S. Clark,

Secretary.

Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney in the Matter of American Cyanamid, File No. 951–0106

The Commission today accepts a proposed consent agreement with American Cyanamid prohibiting it from engaging in conduct designed to prevent its dealers from making discounted sales below the minimum price that American Cyanamid specified. American Cyanamid entered into written agreements with its dealers that provided dealers with ''rebates'' each time they sold their product at or above a certain resale price (the floor transfer price). For dealers who sold at the specified price, this rebate constituted their entire profit margin. The Commission believes that this conduct amounted to an illegal resale price maintenance agreement.

Commissioner Starek, in his dissent, criticizes this enforcement action for a number of reasons. As explained below, we disagree with Commissioner Starek's reasoning.

First, the dissenting statement appears to conclude that a situation where a manufacturer and a dealer enter into an express agreement that the manufacturer will pay the dealer to adhere to the manufacturer's specified resale price, is not an ''agreement on resale prices'' but rather some form of voluntary behavior. Judge Posner responded to similar arguments in *Khan* v. *State Oil*.[1]

In *Khan*, the court declared a maximum resale price arrangement *per se* illegal where the manufacturer permitted dealers to charge above a maximum price, but required them in such case to provide any resulting profit above the maximum price to the manufacturer. The ''voluntary'' nature of the arrangement did not detract from the finding that there was an agreement. Judge Posner noted that the arrangement was indistinguishable from an agreement not to exceed the maximum price, because the dealer was sanctioned for violating the agreement by having to remit any resulting profit to the manufacturer. In responding to State Oil's argument that there was no price fixing agreement, Judge Posner observed: ''The purely formal character of the distinction that it urges can be seen by imagining that the contract had forbidden Khan to exceed the suggested resale price and had provided that if he violated the prohibition the sanction would be for him to remit any resulting profit to State Oil.''[2]

We agree with Judge Posner. In this case, the sanction was loss of the rebate for sales made below the floor transfer price. If an agreement to forego one's entire profit margin if one departs from the specified price does not constitute a price maintenance agreement, then nothing remains of the *per se* rule.

Second, the dissent seems to suggest that this case is one where agreement is being inferred from unilateral conduct. We cannot concur. American Cyanamid entered into written agreements which offered financial incentives for adherence to a minimum price schedule. Courts, both before and after *Sharp*,[3] have held such arrangements unlawful where adherence to a suggested price was the quid pro quo for the financial inducements. Judge Posner's decision in *Khan* is consistent with this approach.[4]

Third, the dissenting statement, relying in large part on recent economic literature, argues that American Cyanamid's program should not be condemned without proof of a supplier cartel, dealer cartel, or market power.[5] That view is inconsistent with the Supreme Court's view that resale price maintenance continues to be illegal *per se* and we reject the idea that the Supreme Court can be overruled by scholarly contributions to economic journals.

Finally, we cannot agree with the suggestion that this enforcement action somehow creates uncertainty about the Commission's treatment of pass through rebates or cooperative advertising programs. As the analysis to aid public comment explains, pass through programs have always been permitted,

[1] 93 F.3d 1358 (7th Cir. 1996).

[2] *Id.* at 1361. *See also Isaksen* v. *Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (in finding a violation based on economic coercion, Judge Posner noted, ''It is as if Vermont Castings had told Isaksen that it would reduce its wholesale price to him if he raised his retail price, and Isaksen had accepted the offer by raising his price.'').

[3] *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988).

[4] 93 F.3d at 1362.

[5] Although we do not fully detail our disagreement with the description of the facts in the dissent, we believe that a full trial would have shown that an overwhelming portion of sales were made at or above the minimum resale price. Moreover, a dealer's advisory council voted to advise American Cyanamid to retain the program in order to protect its margins.

as long as the dealer is free to discount to an even greater extent than the pass through amount. Similarly, both the courts and the Commission have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer's right: (1) To discount below the advertised price, and (2) to advertise at any price when the dealer itself pays for the advertisement. Unlike those programs, American Cyanamid's rebate program controlled the actual prices charged and was structured to prevent dealers from pricing below the floor transfer price.

Concurring Statement of Commissioner Mary L. Azcuenaga in American Cyanamid Co., File No. 951–0106

I concur in the decision to accept the consent agreement for public comment but decline to join the separate statement of the majority. The consent agreement, which includes the consent order and the complaint on which it is based, constitutes the decisional document of the Commission. My substantive views on this matter are contained entirely within the four corners of the decisional document. If the majority wants to revise or expand its decision, the proper course is to revise the decisional document. *See* Dissenting Statement of Commissioner Mary L. Azcuenaga in *Dell Computer Corp.* at 21–23 (Docket No. 3658, May 20, 1996).

Dissenting Statement of Commissioner Roscoe B. Starek III, in the Matter of American Cyanamid Company, File No. 951–0106

I respectfully dissent from the Commission's decision to accept a consent agreement with the American Cyanamid Company (''AmCy''), a producer of agricultural chemicals. The proposed complaint claims that certain aspects of AmCy's compensation arrangement with its dealers constitute per se illegal resale price maintenance (''RPM''), in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. I do not agree that AmCy's dealer rebate policies constitute the functional and legal equivalent of RPM agreements. Consequently, I conclude that the decision to challenge AmCy's distribution policies would expand substantially the range of activities condemned by the Commission as Illegal per se. This policy is ill-advised and runs contrary to twenty years of case law in which the scope of vertical arrangements subject to per se condemnation has been steadily narrowed. This case is an especially poor vehicle for expanding the scope of the per se rule, for it would be difficult to find conduct that better exemplifies the economic deficiencies of that standard.

Condemning certain conduct as illegal per se normally is rationalized by the belief that the conduct in question is so frequently pernicious that one cannot justify the cost of attempting to identify the few instances in which it is not. Whether RPM warrants characterization as per se illegal conduct has increasingly been called into question by antitrust scholars; [1] indeed, it would be difficult to find an antitrust economist who would defend this enforcement standard.[2] RPM remains illegal per se, however, and, consistent with this standard, I have voted to support enforcement actions against RPM agreements when I have been convinced that (1) the conduct in question plainly constituted an illegal agreement on price (as construed by contemporary case law), and (2) the relief was appropriately tailored to deter future illegal conduct.

Notwithstanding the continued per se treatment of RPM—and my willingness to support RPM cases in the limited circumstances identified above—I cannot ignore the persistent accumulation of economic evidence demonstrating the potentially procompetitive (or, or worst, economically neutral) nature of RPM agreements. At minimum, this evidence counsels against expanding the boundaries of per se illegal conduct to envelop activities that (at best) only weakly satisfy the legal criteria for finding the existence of an ''agreement'' and, more important, appear to be procompetitive in both purpose and effect. Under these evaluative criteria, the present matter is a poor candidate for an enforcement action.

The Supreme Court set forth the legal standard for finding an illegal RPM ''agreement'' in *Monsanto Co.* v. *Spray-Rite Service Corporation:* [3]

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to provide that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Monsanto, 465 U.S. at 768. The Court stated further that the ''concept of 'a meeting of the minds' or 'a common scheme' * * * includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.'' Id. at 764 n. 9 (emphasis added).

While it is true that AmCy entered into contracts with its distributors providing for compensation for sales at or above the wholesale purchase price, it is clear that there was no ''meeting of the minds'' or ''common scheme,'' and thus no illegal agreement, to maintain resale prices. At no time did AmCy tell its distributors that they must sell agricultural chemicals at specific prices or risk losing supplies; AmCy did not attempt to coerce or intimidate its distributors into selling at specific price levels; distributors did not communicate an agreement to sell at specific prices; no distributors were ever terminated for selling at prices below the wholesale price; and distributors remained free (explicitly provided by contract) to resell products at any price of choosing. That distributors sometimes sold at prices below the wholesale level without loss of supply or termination is testament to the unilateral nature of the distributors' pricing decisions and to the absence of any agreement to maintain resale prices.[4] In this instance, all of the

[1] There is a substantial body of economic literature demonstrating that RPM frequently can be socially beneficial. See, e.g., Michael L. Katz, ''Vertical Contractual Relations,'' in Richard Schmalensee and Robert D. Willig, 1 Handbook of Industrial Organization 655 (1989). The existing empirical literature fails to find evidence supporting an anticompetitive characterization of RPM. See e.g., Pauline M. Ippolito & Thomas R. Overstreet, Jr., ''Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works,'' 39 J.L. & Econ. 285 (1996) (evidence convincingly rejects anticompetitive theories and suggests instead that RPM increase sales of Corning's products); Pauline M. Ippolito, ''Resale Price Maintenance: Empirical Evidence from Litigation,'' 34 J.L. & Econ. 263 (1991) (empirical evidence cannot support a collusive explanation for the use of RPM).

[2] I also emphasize that in none of the RPM actions brought by the Commission during my tenure could one have plausibly characterized the condemned conduct as having an anticompetitive effect (indeed, in several instances, procompetitive rationales for the restrictions were plainly evident). In only one instance, Nintendo of America Inc., 114 F.T.C. 702 (1991), could one have plausibly ascribed market power to the manufacturer that was party to the agreement. Without manufacturer market power, RPM agreements between a single manufacturer and its dealers cannot harm consumers. Of course, it cannot be overemphasized that market power is only a necessary, but not a sufficient, condition for vertical restraints to reduce consumer welfare; by itself, market power does not establish that the conduct is anticompetitive. Even when a manufacturer possesses substantial market power, all of the procompetitive rationales for vertical restraints remain potentially valid.

[3] 465 U.S. 752 (1984).

[4] Evidence suggests that distributors in fact sold specific products covered by the AmCy program at retail prices both above and below the wholesale transfer price. Wide variation in distributor resale prices runs contrary to usual evidence of a

hallmarks of a per se illegal RPM agreement are lacking.

Evidence that dealers did in fact resell AmCy products at or above the wholesale purchase price does not relieve the Commission of its obligation to demonstrate the existence of an illegal agreement. As made clear by Colgate,[5] a unilateral, self-motivated decision by a distributor to accept a manufacturer's pricing policies, and thus sell products at a suggested retail price, does not constitute an illegal RPM agreement. In Monsanto, the Supreme Court stated: ''Under Colgate, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.'' 465 U.S. at 761. As Monsanto and Colgate make clear, something more than mere acquiescence by a distributor in a manufacturer's pricing policies is necessary to convert a unilateral decision by a distributor into an agreement to maintain resale prices.

I am therefore puzzled why the majority is so quick to infer the existence of a per se illegal RPM agreement from evidence that many distributors found it in their self-interest unilaterally to sell at or above the wholesale price and thereby receive rebates from AmCy. To infer the existence of a per se illegal RPM agreement in this context, when AmCy never announced minimum resale prices nor sought a commitment from distributors to sell at or above certain price levels, violates the fundamental legal principle of RPM law announced in Colgate. How can the majority find a per se illegal agreement here—under arguably weaker factual circumstances than existed in Colgate—and believe that it still seeks to enforce the rule announced in Colgate, and reiterated in Monsanto, that mere acquiescence by a distributor in the pricing policies of a manufacturer is insufficient as a matter of law to warrant inference of the existence of a per se illegal RPM agreement?[6]

The majority's finding that AmCy entered into illegal RPM agreements with its distributors is nothing less than a retreat from the principles of vertical restraints analysis laid down by the Supreme Court in Colgate, Monsanto, Sylvania,[7] and Sharp.[8] In cases involving allegations of concerted price fixing, ''the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in Sylvania and Colgate will be seriously eroded.'' Monsanto, 465 U.S. at 763. I conclude that the standard set forth by Supreme Court for the finding of a price-fixing agreement has not been met. That the majority is willing to infer the existence of an agreement in this instance on the basis of such ambiguous evidence, and to rely primarily on pre-Sharp case law and post-Sharp dicta and one case not on point[9] to justify its conclusion, represents an effort to circumvent the law of RPM (and of vertical restraints in general) laid down by the Supreme Court over the last twenty years.[10]

The majority's decision to accept a consent agreement here also cannot be supported on economic grounds. The per se treatment of RPM usually is justified by the assertion that such agreements almost invariably are used to support collusion, either among manufacturers or among distributors.[11] RPM could support manufacturer collusion for two reasons.[12] First, RPM may make it easier to detect cheating on a cartel agreement, because resale prices (presumably) are easier to observe than wholesale prices, and successful monitoring of prices is necessary for any successful collusive price agreement to work.[13] Second, RPM may reduce the incentive to cheat on a cartel because a manufacturer cutting its wholesale price will not increase sales by very much if the corresponding resale price cannot fall.[14] If RPM is being used to facilitate manufacturer collusion, we would expect to see other manufacturers adopting similar price restrictions; collectively, these manufacturers would

minimum resale price fixing agreement. As Chairman Pitofsky has stated: ''The one point that emerges clearly in any debate concerning the per se rule is that minimum vertical price agreements lead to higher, and usually uniform, resale prices.'' Robert Pitofsky, ''In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing,'' 71 Geo. L.J. 1487, 1488 (1983). The Commission's proposed compliant does not allege, nor provide supporting evidence, that the rebate program resulted in higher retail prices for AmCy's products. Moreover, the wide dispersion in resale prices demonstrates the absence of the type of uniformity believed to be an indicator of a minimum resale price agreement. This dispersion in retail prices suggests that distributors were engaging in loss-leader programs out of a desire to increase future sales of AmCy products. In addition to encouraging distributors to provide valuable pre-sale services, AmCy's rebate program may have encouraged distributors to engage in loss-leader programs as a means of persuading customers to switch to AmCy products.

[5] *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).

[6] Although the majority's reply emphasizes ''written agreements'' pursuant to which dealers were offered compensation for sales at prices above the wholesale transfer price (Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A Varney in the Matter of American Cyanamid, at 2), the proposed complaint in this case indicates that the Commission is willing—despite the clear warnings of Colgate and Monsanto to the contrary—to infer the existence of per se illegal RPM ''agreements'' solely from the dealers' unilateral acceptance of AmCy's ''offer.'' Proposed Complaint, at ¶ 6 (''The dealers overwhelmingly accepted AmCy's offer by selling at or above the specified minimum prices.'').

[7] *Continental T.V., Inc.* v. *GTE Sylvania Inc*., 433 U.S. 36 (1977).

[8] *Business Electronics Corp.* v. *Sharp Electronics Corp*., 485 U.S. 717 (1988).

[9] The majority relies heavily on Judge Posner's opinion in *Khan* v. *State Oil Co*., 93 F.3d 1358 (7th Cir. 1996). Besides the obvious difference that *Khan* deals with maximum rather than minimum RPM, the facts of *Khan* are fundamentally different. The contract between State Oil (the supplier) and Khan (the dealer) provided that State Oil would announce a suggested retail price for gasoline and sell it to Khan for 3.25 cents per gallon less. The contract further required Khan to rebate to State Oil any profit received for sales above the suggested retail price. As Judge Posner noted, the contract eliminated any incentive for Khan to charge above the suggested retail price. Since absolute compliance was thus guaranteed under the facts of *Khan*, it is not surprising that a dealer challenged the program. AmCy, on the other hand, never announced suggested retail prices to its dealers, never established an explicit mark-up, and never required dealers to seek permission before lowering their price. The fact that AmCy's dealers frequently lowered retail prices below the wholesale purchaseprice indicates that AmCy did not implement its rebate program in order to eliminate dealers' incentives to reduce prices (*e.g.*, to develop new customers, to increase business with existing customers, or to encourage switching by customers from other manufacturers' agricultural products to AmCy's products). The majority's reliance on *Khan* is therefore of doubtful relevance to this case.

[10] Today's action by the Commission has by no means established a clearer and more certain legal rule for RPM cases than exists under the rule of Colgate and other Supreme Court decisions. Whereas a supplier before today's decision might know with certainty that mere voluntary adherence by a distributor to a unilaterally announced resale price policy does not constitute illegal RPM, the same supplier must now worry that the Commission may henceforth use such voluntary adherence as evidence of a per se illegal agreement to maintain resale prices. Moreover, as a result of today's decision, the business community may be left wondering how the Commission can—and whether it will—maintain the functional distinction it currently draws between, on the one hand, rebate-pass-through provisions and cooperative advertising programs—programs that the Commission generally does not consider to be per se illegal—and, on the other hand, other types of rebate programs that similarly impose restrict conditions on the buyer.

[11] Of course, much of the empirical literature on the actual uses of RPM (see note 1, supra) casts serious doubt upon the validity of this proposition.

[12] See Lester G. Telser, ''Why Should Manufacturers Want Fair Trade?,'' 3 J.L. & Econ. 86 (1960).

[13] See George J. Stigler, ''A Theory of Oligopoly,'' in The Organization of Industry 39, 43 (1968) (''In general the policing of a price agreement involves an audit of the transactions prices.'').

[14] This argument is subject to the obvious limitation that a manufacturer wishing to cheat on the collusive arrangement would have little incentive to enforce the RPM agreement.

have to account for sufficient total output to give them power over price.[15]

As far as I can tell, the ''manufacturer cartel'' theory is not relevant to the present case. The Commission's proposed complaint does not allege, let alone provide supporting evidence, that AmCy has attempted to collude with other agricultural chemical makers, such as DuPont, Monsanto, Ciba-Geigy, or BASF. There is also no evidence that these other firms used RPM, as is required for the theory to work. But even putting aside the absence of such evidence, it is difficult to imagine an arrangement less suited to cartel stability than that which existed between AmCy and its distributors. Specifically, under the terms of AmCy's C.R.O.P.™ and A.P.E.X.™ programs, a dealer's compensation was tied explicitly to the share of chemical sales accounted for by AmCy's products. Given that a crucial element of cartel enforcement is the discovery of some means by which each member can commit credibly to maintaining—but not increasing—its market share,[16] how could a program that explicitly rewards market share expansion plausibly be characterized as a cartel enforcement tool?

Furthermore, the available evidence suggests that the C.R.O.P.™ and A.P.E.X.™ programs were extraordinarily successful in expanding AmCy's sales and market share, which grew substantially while the program was in use. Certainly, other factors (*e.g.*, the successful introduction of several new product lines) may have accounted for a portion of this increase; [17] nevertheless, it is difficult (if not impossible) to reconcile the behavior of AmCy's output—or of total market output—during this period with any coherent theory of competitive harm involving collusion with other chemical makers.

In the alternative, *per se* treatment sometimes is predicated on the characterization of RPM as an aid to dealer collusion. Under such a scenario, a group of dealers pressures the supplier to adopt RPM to achieve and maintain a collusive resale price arrangement among the dealers. When RPM is used for this purpose, we would expect to see coordinated pressure on the manufacturer to adopt RPM from a group of dealers with sufficient market power to credibly threaten the manufacturer. Moreover, to be effective, the dealer cartel must enter into similar arrangements with enough manufacturers to be able to affect market price; otherwise, the collusive retail price of price-maintained products would be undermined by competition from products not subject to RPM agreements. Under such conditions, we would expect the manufacturer to be a reluctant participant in the scheme, though it would enforce the RPM agreement if the dealer threats were credible. Finally, it is unlikely that the colluding dealers would carry competing products not subject to RPM agreements, as that would be equivalent to cheating on the collusively-determined resale margin.

This second anticompetitive theory fits the facts of this case no better than the first. The Commission's complaint does not allege, let alone provide supporting evidence, that AmCy is the victim of a dealer cartel. As I already have noted, it does not appear that other manufacturers had similar arrangements with the members of any putative ''dealer cartel,'' or that this ''cartel'' eschewed the products of rival manufacturers.[18] Had AmCy been the victim of a cartel, its attitude toward the Commission and numerous state investigations should have been one of grateful acquiescence, because the enforcement agencies would be rescuing it from the clutches of its rapacious dealers. In fact, of course, AmCy unilaterally terminated the challenged provisions of the C.R.O.P.™ and A.P.E.X.™ programs several years ago. so much for ''dealer coercion.'' [19]

Given that neither of the two traditional anticompetitive theories can be reconciled with the terms of the AmCy program, could the Commission's action be justified on some other basis? The Commission might attempt to seek refuge in some unilateral theory of market power, under which a manufacturer with substantial *pre-existing* market power is hypothesized to use vertical restraints because, for some reason, it cannot extract the full value of its market power simply by raising its wholesale price. The economics literature certainly acknowledges such possibilities, but these theories provide a fragile basis for antitrust enforcement.[20] As such models show, vertical restraints often can improve consumer welfare even when adopted by firms with substantial market power; [21] the models fail, however, to provide empirical criteria by which enforcers can distinguish anticompetitive from procompetitive effects.[22] Thus, the practical utility of these theories is questionable even for conduct judged under the rule of reason; their inability to justify a policy of *per se* illegality appears self-evident.

On several grounds, therefore, acceptance of the consent agreement in this matter represents a poor policy choice by the Commission. From a legal perspective, AmCy's conduct does not constitute an illegal agreement to maintain resale prices; from an economic perspective, the evidence points to the conclusion that AmCy's conduct was procompetitive; and from a policy perspective, the Commission's decision hardly delineates a clearer distinction (and in fact seriously blurs the line) between conduct likely to be subject to *per se* condemnation and conduct that is not. Instead of reaching for ways to expand the application of the *per se* rule to conduct that is plainly procompetitive, enforcers should

[15] Of course, all of the standard factors used to analyze market power and the ability to implement and maintain collusive pricing (e.g., ease of entry, heterogeneity of the products, and so forth) would also be relevant to judging the likelihood of successful supplier collusion.

[16] As Stigler (*supra* note 13, at 42) noted, ''[f]ixing market shares is probably the most efficient of all methods of combating secret price reductions.''

[17] The likelihood of successfully maintaining collusion in the face of product innovation (as was occurring in this instance) is, of course, quite small. Collusion is more likely to be successful, the greater the degree of similarity (*e.g.*, in terms of cost, demand, and product characteristics) among the parties to the agreement.

[18] This is unsurprising, because over 2500 dealers participated in the C.R.O.P.™ and A.P.E.X.™ programs. It is fanciful to believe that a cartel could have been formed from among such a large number of dealers. If such a cartel exists, one might reasonably ask why the dealers that belong to it are not also named in the Commission's complaint.

[19] In its reply, the majority appears to suggest that the existence of a dealer cartel can be inferred from the allegation that ''a dealer's advisory council voted to advise American Cyanamid to retain the program in order to protect their margins.'' Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney in the Matter of American Cyanamid, at note 5. Even if an advisory council furnished this advice to AmCy, communications of this nature between dealers and manufacturers do not establish that the dealers acted collusively. Moreover, the fact that dealers may have communicated this advance says nothing about the competitive effects of AmCy's rebate program. One would expect dealers to provide this same ''advice'' if AmCy's program were designed to prevent discounters from free-riding on the pre-sale services provided by other dealers.

[20] *See, e.g.,* Remarks of Commissioner Roscoe B. Starek, III, ''Reinventing Antitrust Enforcement? Antitrust at the FTC in 1995 and Beyond,'' before a conference on ''A New Age of Antitrust Enforcement: Antitrust in 1995'' (Marina del Rey, California, Feb. 24, 1995).

[21] As I noted earlier (*supra* note 2), market power is a necessary, but not a sufficient, condition for vertical restraints to reduce consumer welfare.

[22] As Katz (*supra* note 1, at 713–14) notes, ''[m]uch of the literature on vertical restraints has been conducted with the express aim of deriving policy conclusions. But in many, if not most, instances there is no widespread agreement on whether a particular vertical practice is socially beneficial or harmful. This unhappy state of affairs is due, in part, to the fact that all of the practices can be beneficial in some instances and harmful in others, and it may be extremely difficult to distinguish between the two cases.''

reserve their heavy hand for conduct that falls within standards for *per se* illegality clearly enunciated by the Supreme Court. Accordingly, I cannot support the proposed enforcement action made public today.

[FR Doc. 97–3341 Filed 2–10–97; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30DAY–28]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Office on (404) 639–7090. Send written comments to CDC, Desk Officer; Human Resources and Housing Branch, New Executive Office Building, Room 10235; Washington, DC 20503. Written comments should be received within 30 days of this notice.

The following request has been submitted for review since the last publication date on February 4, 1997.

Proposed Project

1. Biomechanical Stress Control in Drywall Installation—New-Drywall installers represented approximately 1.42% of the construction workforce in 1992. Based on analysis of the Supplementary Data System (BLS) of 21 states, the compensable injury/incidence rate (27.5 cases per 100 workers for this group) was nearly three times the injury rate of 9.5 for all other construction occupations combined, in 1987. Data from the 1992 and 1993 Annual Survey of Occupational Injuries and Illnesses (BLS) indicated that there were an estimated 4,680 traumatic injuries among drywall installers involving days away from work in the construction industry in 1992, and 4,122 in 1993. In 1993, bodily reaction and exertion (31.8%), falls (28.6%), and contact with objects (24.6%) were the leading events of injury and illness involving days away from work. As a result, sprains and strains (40.6%) constituted the most frequent nature of injuries and illnesses category in 1994.

To gain an understanding of these injuries, NIOSH has initiated this project to examine different approaches in both field and laboratory settings to identify and control the high-risk activities associated with the traumatic injuries and overexertion hazards of drywall installation work. One of the field study components for this project is to identify high-risk tasks and activities for drywall installers, using a drywall installation survey which was developed at NIOSH. The findings of this survey will provide further understanding and focus laboratory research efforts on the most hazardous tasks/activities of drywall-installation work. Study populations will include drywall installers or construction workers with drywall installation experience. Each questionnaire will take approximately 20 minutes to complete. The total annual burden is 30.

Respondents	Number of respondents	Number of responses/ respondent	Average burden/re-sponse (in hrs.)
Drywall Installers	120	1	.25

Dated: February 5, 1997.

Wilma G. Johnson,

Acting Associate Director for Policy Planning and Evaluation, Centers for Disease Control and Prevention (CDC).

[FR Doc. 97–3332 Filed 2–10–97; 8:45 am]

BILLING CODE 4163–18–P

Food and Drug Administration

[Docket No. 96E–0388]

Determination of Regulatory Review Period for Purposes of Patent Extension; MERREM® I.V.

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for MERREM® I.V. and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

ADDRESSES: Written comments and petitions should be directed to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Brian J. Malkin, Office of Health Affairs (HFY–20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–1382.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product MERREM® I.V. (meropenem). MERREM® I.V. is indicated as single agent therapy for the treatment of the following infections