UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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Direct Dial
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July 2, 2012

Eugene A. Guilford, Jr.
President
Independent Connecticut Petroleum Ass'n
10 Alcap Ridge
Cromwell, Connecticut 06416

Re: FTC Staff Advisory Opinion

Dear Mr. Guilford:

This letter responds to your request, on behalf of the Independent Connecticut Petroleum Association ("ICPA"), for an FTC staff advisory opinion. You seek the staff's assessment of the ICPA's contemplated system for collecting a voluntary per-gallon assessment from heating oil retailers to fund a variety of educational and training programs.

Three issues are of potential concern here. Do the structure and purposes of the program suggest that it "would always or almost always tend to restrict competition and decrease output,"[1] such that it might be deemed unlawful per se, that is, without further analysis?[2] Might increased retail dealer costs result in anticompetitive price increases? And is it possible that firms may use the reporting features of this system to gain competitively sensitive information about the pricing and behavior of others?

We understand, however, that the ICPA's plan incorporates features intended to minimize these concerns: (1) wholesaler and retailer participation in the program will be voluntary, with participants remaining free to withdraw from the program at any time; (2) given the non-coercive structure of the program, potential effects on retailer prices likely will be tempered by competition and offset by efficiencies; and (3) information about purchase volumes will be aggregated into combined numbers at each step of the reporting process, with the ICPA reporting to its members only the total combined numbers for all participating wholesalers. This level of aggregation likely will prevent firms from obtaining competitively useful information about individual rivals. In view of these facts, the FTC staff has no present intention of recommending to the Commission that it challenge the implementation of this program.

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[1] Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20 (1979).

[2] *See id.*

In forming this intention, we have relied entirely on a review of the written materials and other representations that you have given to the FTC staff. Should there be information that we are unaware of that qualifies, modifies, or contradicts any of these materials or representations or that calls in to question the conclusions we have drawn from them, or should the proposed activities materially change in the future, then we may change our recommendation accordingly.

The background facts

The Independent Connecticut Petroleum Association is a voluntary association organized under Section 501(c)(3) of the Internal Revenue Code. It is made up primarily of retail heating oil dealers operating in the state of Connecticut, plus their associated businesses. There are approximately six hundred such heating oil retailers registered with the state's Department of Consumer Protection. They are supplied by thirteen wholesalers.

Some consumer industries benefit from congressionally-sanctioned programs under which the industry assesses a fee on each unit produced or sold, with the proceeds going to an industry association for use in improving, or increasing consumer familiarity with, its products. Well known programs financed in this way include "Cotton, the Fabric of Your Life," and "Pork, the Other White Meat." At present there are about 24 such programs authorized by statute in the United States.

For several years the home heating oil industry operated such a congressionally-sanctioned program, which was implemented through the National Oilheat Research Alliance.[3] The statute authorized collection of a fee of one-fifth of a cent per gallon, assessed at the wholesale level. After the fee was collected by the wholesalers, the revenue was sent to the Alliance's national office, and then 75 percent of the revenue collected from each state was sent back to the authorized state association for consumer education, technology research, and training subsidies for people working in the industry. In the case of Connecticut, that association was the ICPA.

The statutory authorization for collecting the mandatory fees has since lapsed. The original statute was passed and signed by President Clinton in 2000, and was reauthorized in 2005. It was then scheduled to terminate in 2010, unless further extended. Congress did not make such an extension. There are two bills presently pending in Congress to revive the program, which the ICPA supports.

In the meantime, the ICPA is considering a voluntary program that will replicate many features of the lapsed statute. This will permit financing of some of the former program activities while Congress considers reauthorization. The planned activities will include consumer education and technical training for retailers. Presumably the ICPA program will provide some measure of benefit to consumers and the industry even if Congress does not renew the statutory program.

The proposed ICPA program

The ICPA proposes to implement its program through a series of contracts. Willing retailers would authorize participating wholesalers to add the fees to their bills, and the wholesalers would commit to sending the collected sums to the ICPA. The amount of the fee would be twelve points (twelve hundredths of a cent) per gallon, somewhat less than the fee had been under the

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[3] *See* Public Law 106-469, sections 701 et seq.

statutory program. The contractual program would automatically terminate when and if the original Oilheat Alliance legislation is renewed.

It is this program that has prompted your request for an advisory opinion.

The issues presented

The program presents three issues for consideration: (1) Do the structure and purposes of the program, which is the product of agreement among industry participants,[4] suggest that it should be judged on a per se basis or according to the rule of reason? (2) Does the program threaten to cause consumer prices to rise in a way attributable to a lessening of competition? (3) Will the processes for collecting, reporting, and conveying the fees result in some firms learning sensitive information about other market participants?

Structure and purposes of the agreement

The threshold question involves the structure and purposes of the program. This is important because it will affect whether the competitive import of the plan here should be reviewed under a per se standard or according to the rule of reason.

Naked agreements among competitors on price are condemned on a per se basis, without elaborate inquiry. Some agreements on association assessments have been characterized as per se violations in this way. For example, an agreement among competitors to coerce universal participation in an industrywide program that raised firms' costs was condemned as unlawful per se in *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n.*[5] Such a conclusion might be reached if the coercion were applied directly to holdout rivals, or applied indirectly through the assistance of another entity that was in a position to influence the rivals.[6]

Here, however, it appears that any agreement among industry participants[7] is voluntary. Your letter explains that non-participating companies will not suffer adverse consequences as a result of any decisions to not participate or to withdraw from participation. Participation is to occur "on an entirely voluntary basis without any coercion whatsoever . . . . Those who choose not to

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[4] Section 1 of the Sherman Act condemns only contracts, combinations, and conspiracies–i.e., agreements–that unreasonably restrain trade. *See* 15 U.S.C. 1. It does not condemn independent single-firm conduct, irrespective of its purpose or effect. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).

[5] 814 F.2d 358 (7th Cir. 1987).

[6] *See id.* at 368.

[7] Without first performing a formal market definition exercise it is not possible to know whether or to what extent the ICPA members are actual competitors in one or more of the Connecticut markets. For purposes of this analysis we assume that the members are competitors, at least respecting some relevant markets for heating oil.

participate would face no significant economic consequences as a result of that decision."[8] An agreement to form a voluntary group for educational purposes, without coercing firms outside of the agreement, will be judged under the rule of reason.[9]

Price effects under the rule of reason

Once it is determined that rule of reason analysis is applicable to an agreement, a variety of effects and benefits can be considered. Industry-wide trade associations are not intrinsically suspect under the antitrust laws. To be sure, they involve agreements among firms that may be competitors in other respects, but the collaborative activities of an association do not necessarily reduce competition – they may instead increase output and enhance consumer welfare. Acceptable collaborative activities of this sort can include consumer awareness campaigns,[10] development of industry technical standards,[11] and professional training programs.[12] These are the kinds of activities that the new ICPA program is reportedly intended to pursue.

A rule of reason analysis need not always go so far as to require a full scale assessment of all potentially relevant considerations; rather, "what is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."[13] As the Commission's *Polygram* opinion establishes, under some circumstances it is appropriate to perform a "truncated rule of reason" or "quick look" in which the Commission considers the capacity of the conduct at issue to facilitate competitive harm against its tendency or ability to further plausible and cognizable procompetitive ends.[14]

One element in a rule of reason assessment is an examination of likely price effects. As a threshold matter, it appears that the assessments that are made will increase the expenses of participating retail dealers, however modestly. It is therefore possible that some of those

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[8] Letter from Eugene A. Guilford, Jr., President, ICPA to Donald Clark, Secretary of the Federal Trade Commission, at p.3 (Feb. 17, 2012).

[9] *See* nn.10-12, *infra*. *See also* Premier Electrical Construction, *supra,* at 371 n.3.

[10] *See* Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 554 (2005); Michigan Pork Producers Ass'n v. Veneman, 348 F.3d 157, 160 (6th Cir. 2003), *vacated and remanded on other grounds*, 544 U.S. 1058 (2005). In these cases there were issues as to whether the fee assessment programs involved improperly compelled speech, but the collective conduct of the programs was not challenged on antitrust grounds.

[11] *See* American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 559, 576 (1982).

[12] *See* California Dental Ass'n v. FTC, 526 U.S. 756, 765 (1999).

[13] *Id.* at 781.

[14] *See* Polygram Holdings, 136 F.T.C. 310 (2003) (applying principles from the Supreme Court's decision in *California Dental Ass'n, supra*). If a quick look indicates that there is a plausible and cognizable efficiency underlying a restraint, a more searching rule of reason analysis may be warranted.

increased costs would be passed on to consumers.[15] For two reasons, however, it appears that any such possibility here would not call the ICPA proposal into question.

First, it is not clear that prices will increase as a result of the proposed program. If retailers find that the incremental expenses imposed by the fees are offset by the increased efficiency that participation in the program brings, then the retailers' true net costs will not have been increased, and we would not expect the program to have an adverse effect on consumer prices. Moreover, even if stated transaction prices do go up by as much as the entire fee assessment amount, twelve hundredths of one cent per gallon, it is possible that any such price increases will reflect increased value to consumers, resulting directly or indirectly from the fee-funded programs of training and information.

Second, it does not appear that any price increase, in either of these respects, would have been the product of a lessening of competition. The voluntary context of the program is central in reaching this conclusion. If any retailer believes that the assessed fees are causing a measurable and unwarranted rise in consumer prices – in either stated prices or quality-adjusted ones – it can, and seemingly would have an incentive to, withdraw from the program, secure a modest cost advantage over its rivals who continue to participate, and reduce its prices to that extent so as to compete more effectively for consumers' business. The continuing possibility of such a shift by competitors will limit the price risks that the ICPA program poses to consumers, such that any price effects likely would not be attributable to a reduction in competition.

Information exchanges

A final question presented by the proposed program involves the possibility of anticompetitive information exchanges. The program might raise concerns if it were intended to facilitate collusion, or if there were some feature in it that would give businesses competitively sensitive data about the prices paid or charged by their rivals.

Under the antitrust laws, the legality of information exchanges among competitors is also analyzed under the rule of reason. Here the rule of reason balances the potential for competitive harm against efficiencies or other procompetitive effects, if any, that the information exchange generates.[16] Among other factors, a rule of reason analysis may inquire into market structure and the nature of the exchanged information to assess whether the exchange is likely to reduce the vigor of competition.[17]

Applying this methodology, it does not appear that the information sharing contemplated here is likely to result in competitive harm.

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[15] These costs would not exceed 85 *cents* per year for a household using the statewide average of 708 gallons of heating oil.

[16] *See* United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978) (information exchanges among competitors should be judged by the rule of reason, at least when no evidence of actual agreement to limit competition, because they do not always produce anticompetitive effects, but can also have procompetitive consequences by increasing efficiency).

[17] *Id. See* United States v. Container Corp., 393 U.S. 333 (1969) (condemning price exchange agreement, without detailed proof of market effects, largely because of the nature of the information exchanged, structure of the market, and absence of a benign justification).

The flow of data will largely follow the procedures that had been established under the now-expired Research Alliance program. Wholesalers will collect the per-gallon contribution on an ongoing basis as they bill their retail dealer customers. The wholesalers will then aggregate these collections and send a single payment to the ICPA each quarter. Because the per-gallon rate is known, the ICPA could deduce from the size of the payment how many total gallons a wholesaler had sold to participating retailers in the previous quarter. But the actual transaction prices could not be deduced from the payments, nor could an observer identify the division of sales among particular retailer customers.

Data will be further aggregated at the association level. The ICPA has committed itself to a policy of keeping the contributions from individual wholesalers confidential. It will communicate to its members only the total combined sum received from all wholesalers during the previous quarter. From this it would not appear possible to deduce even overall retailer participation rates in any particular market. The ICPA reports will be issued in the ordinary course of business, as part of an accounting of the revenues received and the research and promotional activities that are financed.

Information aggregated in these ways is unlikely to lead to anticompetitive results. In reaching this conclusion we have been guided by the Commission's statements on information exchanges in the context of the health care industry. One of these addresses "Provider Participation in Exchanges of Price and Cost Information."[18] Those guidelines were originally drafted for a different industry, but their analytical principles have wider relevance. Moreover, the guidelines were drafted to assess a more sensitive kind of information exchange than is involved here, because they address exchanges of data on prices, wages, costs, and salaries, and not just information on quantities of product sold.[19]

The Price Exchange guidelines provide a safety zone for aggregated data that is: (1) managed by a third party such as a trade association; (2) made up of information from at least five participants; (3) not reliant on any one firm for more than 25 percent of the weight of a particular statistic; and (4) using data more than three months old.

The proposed ICPA program appears to be reasonable in light of these tests. The data here would be collected by a trade association, and not circulated. Because there are about six hundred heating oil retailers in the state, and thirteen wholesalers, it is likely that there will be data from at least five firms behind each statistic.[20] For similar reasons, it is unlikely that any one firm will account for more than 25 percent of the weight of any one statistic. On the fourth point – the age of the data – the proposed plan does not meet the guidelines' safe-harbor test of using information more than three months old. However, the guidelines recognize that conduct falling

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[18] *See* "Statements of Health Care Antitrust Policy," Statement 6, *available at* http://www.ftc.gov/bc/healthcare/industryguide/policy/statement6.htm .

[19] We note, however, that in other contexts the exchange of information as to quantities sold could be anticompetitive. For example, the exchange of such information among members of an oligopoly could enable the oligopolists to better observe changes in market share, which in turn could facilitate or be part of an agreement to avoid the type of aggressive pricing that can undermine a pricing consensus.

[20] You point out that the participation rate in the program cannot be known with certainty until the program is actually offered to the industry. You believe that a high participation rate is likely. If the facts develop in ways that we have not anticipated, however, and if competitive problems appear as a result, then the agency retains the right to withdraw this opinion, as described in the concluding section of the letter.

outside the safety zone nevertheless may be unlikely to harm competition, and should be assessed on a case by case basis. The quantity-sold data to be exchanged under the ICPA program is, in the context of this industry, unlikely to be competitively sensitive. Accordingly, its exchange among competitors is unlikely to facilitate anticompetitive outcomes.

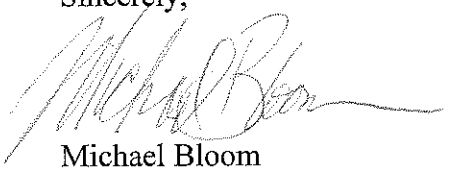
Conclusion

On the basis of these features, FTC staff concludes that the proposed ICPA program would be unlikely to harm competition. Staff believes that the particular data being shared here is not especially sensitive in light of the workings of this industry, and, in any event, that it will be sufficiently aggregated to substantially eliminate any risk that it will facilitate anticompetitive effects at either the wholesale or the retail level. The program appears, moreover, to be voluntary rather than coercive, and to have the goal of financing potentially output-enhancing and safety-enhancing features.

For these reasons, the Bureau of Competition staff has no present intention to recommend that the Commission undertake an enforcement action against the program upon its implementation. This opinion of the FTC staff is predicated on the accuracy of the information you have provided to us. In accordance with normal practice, the Bureau of Competition reserves the right to reconsider the questions involved and, with notice to the requesting party, to rescind the opinion if actual conduct respecting the ICPA program proves to be anticompetitive in any purpose or effect, or if facts change significantly in the future such that it would be in the public interest to bring an enforcement action.

The views of FTC staff contained herein are provided as authorized by Rule 1.1(b) of the Commission's Rules of Practice, 16 C.F.R. 1.1(b). Under Commission Rule 1.3(c), 16 C.F.R. 1.3(c), the Commission is not bound by this staff opinion.

Sincerely,



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