The views expressed herein are presented jointly on behalf of these Sections only. These Comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

INTRODUCTION

The American Bar Association Section of Antitrust Law and Section of International Law (the Sections) submit the following comments in response to the Japan Fair Trade Commission’s (JFTC’s) invitation to provide comments on the draft revisions (Revisions) to the Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act (Guidelines). The Sections welcome the JFTC’s willingness to provide guidance in this important area of competition law, and acknowledge the substantial effort the JFTC is devoting to provide meaningful Guidelines.

The Sections also welcome the JFTC’s continuing efforts to increase transparency by issuing and refining guidelines under the Antimonopoly Act (AMA). In particular, the addition of examples is appreciated. These Guidelines are particularly important for enterprises seeking to comply with the AMA, as distribution issues are part of the daily business of the majority of enterprises that engage partners to distribute their products and services.

The Sections commend the JFTC’s recognition of the procompetitive effects of vertical restraints and its initiative to assess both their pro- and anti-competitive effects. The Sections consistently note that U.S. antitrust law recognizes that vertical restraints, whether imposed unilaterally or in contractual agreements, often have procompetitive, consumer welfare- and efficiency-enhancing rationales and effects.¹ When, in particular cases, such restraints may have anticompetitive or market-restraining rationales or effects, U.S. law analyzes them under the rule

of reason, in light of the specific characteristics of the products, market participants, transaction characteristics, and other facts and considerations that may helpful determine the net competitive effect of the restraints. This approach promotes rational decision-making that links facts to conclusions and conclusions to policy, ensuring that procompetitive or competitively neutral conduct is not unduly chilled.

However, the Sections submit that aspects of the Revisions do not always support this effects-based approach that the JFTC recognizes. The Revisions prohibit certain classes of restraints as “in principle” violations, which in the Sections’ view, are susceptible to overbroad interpretations that are likely to chill procompetitive conduct. The Sections respectfully offer suggestions and clarifications to address these concerns and to overcome what may be viewed as internal inconsistencies within the Revisions.

EXECUTIVE SUMMARY

The Sections offer comments on the JFTC’s proposed guidance regarding vertical price and non-price restrictions that are commonly imposed in many distribution relationships. With respect to the evaluation of all such restrictions, the Sections recommend using an effects-based analysis akin to the rule of reason. Accordingly, in the absence of collusion among horizontal competitors, the Sections respectfully submit that it is inappropriate to treat resale price maintenance, advertised price restrictions, so-called “strict territorial restrictions,” restrictions on dealings with competitors, or any other vertical restrictions as unfair trade practices “in principle.”

The Sections submit that the tests for evaluating “foreclosure” and “price maintenance” effects, provided in the Revisions, would benefit from further clarification as would the relationship between these tests. The comments below also recommend clarification of the criteria for defining what constitutes an “influential enterprise.” Furthermore, the Sections highlight that the lack of an actual effects requirement applicable to both procompetitive and anticompetitive effects may cause benign, procompetitive arrangements to be condemned as unfair trade practices. While the Sections welcome the addition of more explanatory examples, the creation of well-defined safe harbors, and the recognition that the justifications for some vertical restrictions outweigh any actual or hypothetical anticompetitive effects in the proposed guidance, we suggest that these areas, too, would benefit from additional clarity. Finally, in conjunction with specific comments regarding the proposed treatment of five particular vertical restrictions, the Sections suggest that the guidelines provide more clarity as to when distribution practices will be deemed an abuse of a superior bargaining position or exclusionary monopolization and, thus, governed by separate guidelines.

I. Analysis of effects

The Sections appreciate the addition of language in the Revisions recognizing that vertical restraints may have procompetitive effects and requiring “due consideration” of procompetitive as well as anticompetitive effects. This is similar to the U.S. approach applying

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a rule of reason analysis to vertical restraints.\(^3\) By assessing the effects under a rule of reason under which such restraints are presumptively legal, the antitrust agencies and the courts can protect competition while avoiding prohibiting procompetitive conduct that the antitrust laws intend to encourage.\(^4\) Thus, the U.S. approach focuses on “demonstrable economic effect rather than ... upon formalistic line drawing.”\(^5\)

However, while it appears that the intent behind the Revisions is to ensure consideration of the competitive effects of vertical restraints, restricting sales prices of distributors, prohibiting or discontinuing sales to price-cutting retailers, and restricting price advertising are still considered violations of the AMA “in principle.” On the face of the text, it appears that the absence or presence of actual competitive effects will not be considered when evaluating these types of vertical restraints, which seems inconsistent with the “guidance on criteria for judging legality or illegality of vertical restraints” set forth in Part I.3(1). As discussed further below, the Sections recommend that an effects-based analysis similar to that set forth in Part I.3(1) should be applied to all vertical restraints, and that none should be prohibited as “in principle” violations.

## II. Foreclosure effects and price maintenance effects tests

The Revisions set forth two specific effects-based tests applicable to vertical non-price restraints: the so-called “foreclosure effects” and “price maintenance effects” tests. While the Sections laud the effort to include effects-based tests in the Guidelines, the Sections find the tests vague and difficult to apply when assessing whether certain proposed conduct may pose legal risk.

First, it is unclear when either test will apply. For certain categories of conduct to constitute an AMA violation, there must be foreclosure effects. For others, there must be price maintenance effects. Some appear to require the enterprise imposing the restraint must be an “influential enterprise” and foreclosure or price maintenance effects to be found. At the same time, the “guidance on the criteria for judging legality or illegality of vertical restraints,” in Part I.3(1), lists several factors to be considered in analyzing vertical restraints generally. The revisions do not explain the relationship between these analyses or the purpose in applying different tests to various categories of vertical restraints. It is not clear to the Sections, for example, in determining whether restrictions on passive sales violate the AMA, and whether the factors in Part I.3(1) will be considered at all if “price maintenance effects” are found.

In addition, the Sections find the tests themselves to be vague and set an unduly low threshold for a finding of anticompetitive effects. The Revisions state that foreclosure effects exist where new entrants or existing competitors to the enterprise imposing the restraint are “excluded and/or opportunities available to them are reduced (through, for example, increase of their expenses for conduct of business and/or their discouragement from entering the market or developing new products).”\(^6\) There is no standard for the degree of reduction of opportunity, or

any degree of foreclosure – e.g., “substantial” foreclosure as typically required under the U.S. approach and that is often defined as a specific minimum percentage.\(^7\) Indeed, the analysis is described as “whether or not” foreclosure effects exist. The Sections find the test for price maintenance effects similarly vague. This is particularly problematic as there are certain categories of conduct that may violate the AMA solely if price maintenance effects are found.

With respect to both tests, there does not appear to be any requirement of actual effects.\(^8\) Thus, the test of whether such effects exist could be satisfied with hypothetical or potential effects. In contrast, procompetitive effects must be “actual” to be recognized.\(^9\) This different standard biases any analysis towards finding greater anticompetitive than procompetitive effects.

Finally, the Revisions state that if other enterprises impose similar vertical non-price restraints, that would make it “more likely” for the restraints at issue to have foreclosure or price maintenance effects.\(^10\) This seems to create a concept of “collective effect” for which one enterprise might be liable, despite its having no control over or agreement with other enterprises. To the Sections’ knowledge, this concept is not grounded in economic principles, and exacerbates the uncertainty described above in determining whether a vertical non-price restraint violates the AMA. The Sections submit that companies acting independently and based on legitimate business rationales should not be required “not only to assess the general conduct of [their own] … business but also that of its competitors and the reaction of each to the other, which would be virtually impossible.”\(^11\) As enterprises may not be aware of others’ trade terms, the Sections believe they should not be required to limit their conduct based on speculation about what other enterprises might do and what competitive effect that might ultimately have.

The Sections agree that companies should avoid entering into harmful vertical arrangements that constrain the competitiveness of rivals and thereby preserve or enhance a dominant enterprise’s market power, \(i.e.,\) the ability of the enterprise to raise and maintain prices above the level that would prevail under undistorted competition. However, the issues raised above with regard to the Revisions, and the resultant uncertainty, is likely to chill procompetitive conduct. The Sections respectfully recommend the following measures to help resolve these issues:

- The separate “foreclosure” and “price maintenance” effects tests in Part I.3(2)(a) and (b) should be eliminated, along with references to these types of effects in provisions relating to particular categories of vertical restraints. Relevant factors can be

\(^7\) See, e.g., \(\text{Tampa Elec. Co. v. Nashville Coal Co.}, 365 U.S. 320, 327 (1961); \text{Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.}, 373 F.3d 57, 68 (1st Cir. 2004); \text{Omega Envtl., Inc. v. Gilbarco, Inc.}, 127 F.3d 1157, 1162 (9th Cir. 1997).

\(^8\) The Revisions state, “In order for a particular vertical non-price restraint to be deemed to have foreclosure [or price maintenance] effects, the restraint is not required to cause any said situation.” Guidelines, Part I.3(2)(a) and (b), pp. 8-9.

\(^9\) See Guidelines, Part I.3(3), p. 9 (“In the case where vertical restraints \textit{actually} promote sales of new products, ease new entrants, improve quality and services and so on, procompetitive effects can be recognized.”) (emphasis added).

\(^10\) See Guidelines, Part I.3(2)(a) and (b), pp. 8-9.

\(^11\) See, e.g., \(\text{du Pont v. Federal Trade Comm’n}, 729 F.2d 128, 139 (2d Cir. 1984).\)
incorporated into the general analysis set forth in Part I.3(1) and applied to all vertical restraints;

- The definitions of “foreclosure” and “price maintenance” effects should be clarified if they are included in Part I.3(1), and a degree of foreclosure should be specified;
- Actual effects, or at least not purely hypothetical effects, should be required for both procompetitive and anticompetitive effects;
- The standard for effects to be recognized should be the same for anticompetitive and procompetitive effects (whether required to be actual or not); and
- Vertical restraints imposed by other enterprises generally should not affect the analysis of whether a particular enterprise’s vertical restrictions violate the AMA, unless there is evidence of collusion.

III. Market position and safe harbor

As noted above, under the Revisions, some vertical restraints will violate the AMA only if imposed by an “influential enterprise” and if they have “foreclosure effects” or “price maintenance effects.” The Revisions provide for a corresponding safe harbor for enterprises with a market share of 20% or less. The Sections commend the inclusion of an explicit safe harbor. A safe harbor can reduce transaction costs by providing enterprises with certainty and predictability. Where a safe harbor is limited and it is difficult for enterprises to predict its application, its benefits likely will be decreased.\(^\text{12}\) To enhance the utility of the 20% safe harbor, the Sections suggest that if this safe harbor is intended to apply only to those categories of restraints that have an “influential enterprise” requirement, those categories be clearly listed in full in Part I.3(4).\(^\text{13}\)

The Sections also note that the market position of the enterprise imposing the vertical restraint, “in terms of market share, ranking, brand value, etc.,” is listed as a factor to be considered in judging the legality of vertical restraints generally.\(^\text{14}\) Presumably, this does not overcome the market share-based safe harbor or the threshold for being considered an “influential enterprise,” but the Sections suggest that the Revisions clarify this point.

IV. Justifications

The Revisions do not clearly state when justifications will be considered. Although most of the unfair trade practices under the AMA are limited to conduct done “unjustly” or “without justification,”\(^\text{15}\) the Guidelines mention justifications only in connection with resale price maintenance, restrictions on dealing with a competitor, and tying.\(^\text{16}\) Notably, the Guidelines do not discuss the consideration of justifications in the section on “Criteria for Judging Legality or Illegality of Vertical Restraints.” The Sections recommend that justifications be included in the factors for consideration in Part I.3(1), and that examples of accepted justifications be provided with respect to each type of vertical restraint. The Sections further recommend that justifications

\(^{12}\) Indeed, the Sections generally recommend a higher market share threshold for the safe harbor, e.g., 30% or 40%.

\(^{13}\) For example, it is unclear whether the safe harbor applies to coverage rebates or progressive rebates.


\(^{15}\) AMA, Art. 2, ¶ 9; Designation of Unfair Trade Practices.

\(^{16}\) Part I, Chapter 1.2, p. 13; Part I, Chapter 2.2(c), p. 22-23; Part I, Chapter 2.7(2), p. 33 n.10.
be considered with respect to all types of vertical restraints, including other “in principle” unfair trade practices, not just resale price maintenance.

V. Interbrand and intrabrand competition

The Revisions appropriately point out that vertical restraints may have anticompetitive effects through the reduction or elimination of interbrand or intrabrand competition.\(^{17}\) However, the Revisions further state that free and fair competition “cannot be accomplished simply by securing either intrabrand or interbrand competition, as long as the other one is eliminated.”\(^{18}\) This seems to imply that intrabrand competition must exist and that harm to intrabrand competition is sufficient to find a violation of the AMA. Intrabrand competition is created by a supplier, which sets up its distribution channel as it sees fit. In some cases, there will be no intrabrand competition because the supplier chooses to supply directly or because the supplier has elected to use a sole distributor. Neither distribution method is anticompetitive in itself. In addition, most vertical restraints are likely to result in some reduction of intrabrand competition, which may be offset by increased interbrand competition.\(^{19}\) The Sections recommend that the above-mentioned sentence be deleted, and that the Revisions make clear that, in some cases, restrictions on intrabrand competition may enhance interbrand competition and result in an overall positive effect on competition.

VI. Interaction with other guidelines and provisions of the AMA

As pointed out in the Revisions,\(^{20}\) some categories of conduct addressed in the Guidelines are also potentially covered by the abuse of a superior bargaining position and exclusionary monopolization guidelines. Whether conduct is classified as abuse of a superior bargaining position, a different unfair trade practice, or exclusionary monopolization determines the analytical framework for whether the AMA has been violated (e.g., the level of market share or market power required) as well as the potential surcharge amounts. The Sections recommend that the Revisions provide more clarity, and preferably some specific explanatory examples, as to when distribution practices will be deemed an abuse of a superior bargaining position or exclusionary monopolization governed by separate guidelines.

VII. Resale price maintenance

As the Sections consistently note, U.S. law recognizes that minimum resale price maintenance may constrain intrabrand price competition. The critical issue is whether the proposed Guidelines set the correct balance between price competition and procompetitive distribution efforts.\(^{21}\)

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\(^{17}\) See Guidelines, Part I, pp. 3-5.
\(^{18}\) See Guidelines, Part I.2, p. 5.
\(^{21}\) See, e.g., Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Canadian Competition Bureau’s Draft Enforcement Guidelines for Price Maintenance (June 2, 2014, available at
For over 100 years, the U.S. Sherman Act was interpreted to make resale price maintenance agreements *per se* unlawful. Upon reconsidering the issue in 2007, the Supreme Court decided *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* in which, recognizing that the economic literature is “replete with procompetitive justifications for a manufacturer’s use of resale price maintenance,” it overruled prior case law and replaced the *per se* rule with a rule of reason analysis. The U.S. experience is that price maintenance can raise prices to consumers, but can also facilitate competition among brands of the same product, increasing market output and thus fulfilling a primary purpose of the antitrust laws.

The Revisions state that resale price maintenance practices “usually have significant anticompetitive effects and, as a general rule … tend to impede fair competition.” This guidance is inconsistent with U.S. experience. As the Sections have noted in comments to other jurisdictions, absent collusion or market power, a single manufacturer’s use of vertical price restraints does not generally result in market-wide anticompetitive effects. Rather, the U.S. experience is that competition may be constrained if suppliers are prohibited from incentivizing distributors to engage in non-price competition.

At the retail level, prohibiting retail price maintenance arrangements can lead to fewer services by retailers and less retail choice overall. For instance, consumers sometimes prefer speaking to a trained salesperson at a brick-and-mortar retailer with samples and other services. Thus, it is often procompetitive for “retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer’s position as against rival manufacturers,” with vertical restraints and incentives.

At the manufacturing level, excessive limits on resale price maintenance can also constrain competition. Competition can be imperiled if a new product supplier cannot introduce its products with sales, display, and promotional support sufficient to compete against established brands. As the *Leegin* Court concluded, “Resale price maintenance has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.” The U.S. experience is that the *per se* bar may restrict the available range of market options to the detriment of competition.

This is not to say that the AMA should not constrain resale price maintenance in any way. In concentrated markets, there is greater potential for an adverse impact on overall competition, as well as a greater prospect of collusion, if all producers implement resale price maintenance and there is little or no procompetitive rationale for independently adopting such a strategy. Furthermore, U.S. antitrust law recognizes that the source of a price maintenance

http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_201406_rpm.authcheckdam.pdf.

23 See id. at 878.
26 *Leegin*, 551 U.S. at 878.
27 Id. at 890.
28 Id. at 892.
restraint may be relevant, particularly if the restraint was adopted as a result of pressure from a dominant retailer or collective pressure from a group of retailers seeking to avoid price competition.29

Accordingly, the Sections recommend that the JFTC reconsider categorizing restrictions on resale prices as “in principle” violations and instead apply an effects-based analysis to such practices.

The Sections further recommend that the JFTC take the same approach to analyzing price advertising restrictions that govern the advertising or display of price information by resellers but do not control the resale price. U.S. antitrust law treats such restrictions as non-price vertical restraints, which are evaluated under the rule of reason. Programs under which retailers must adhere to price advertising restrictions (i.e., advertising resale prices at or above a fixed minimum or no prices at all) in order to receive cooperative advertising funds from the supplier have long been upheld by U.S. courts and the FTC.30

Price advertising restrictions may be challenged if and when they effectively impede or eliminate competition.31 But where such restrictions expressly permit retailers to sell at prices set by the retailer, and where discounted sales actually take place, there is a low risk that a price advertising restriction constitutes an “unreasonable” restraint on trade or “unfair” trade practice.

In the event that retail price maintenance and price advertising restrictions are classified as “in principle” violations, the Sections recommend additional guidance on several key aspects. Notably, the Revisions would benefit from further detailed discussion on the “justifiable grounds” for RPM. To the extent the guidelines allow that RPM may be “justifiable” with procompetitive effects—including preventing free-riding—the Sections suggest that the Revisions should provide relevant examples. Without any examples of “justifiable grounds,” the Sections believe that any benefits from predictability stemming from an “in principle” regime would be outweighed by the uncertain scope of potentially permissible RPM practices.

The Sections also propose that the Revisions more clearly define the scope of resale price maintenance programs covered by the “in principle” classification. In particular, the Sections believe the Revisions should clarify that maximum price programs are reviewed for potential effects, and not categorically outlawed. Any potential harm from a cap on retail prices is unlikely to be substantial, and the benefits of a price cap may be significant. As discussed above,

29 Id. at 893-94.


31 See, e.g., In re Time Warner, Commissioners’ Statement at https://www.ftc.gov/public-statements/2000/09/statement-chairman-robert-pitofsky-commissioners-sheila-f-anthony-mozelle (explaining that music distributors’ minimum advertised price policies were unlawful under a rule of reason analysis where the five distributors together accounted for over 85% of the market, and each had market power in that no music retailer could realistically choose not to carry the music of any of the five major distributors; policies were adopted by each of the distributors for the purpose and with the effect of stabilizing retail prices with consequential effects on wholesale prices, ending price competition that had previously existed; compliance with the policies effectively eliminated retailers’ ability to communicate discounts to consumers; and financial incentives ensured that retailers had little incentive to actually sell product at a discount).
practices that are generally procompetitive should not be treated as “in principle” unlawful conduct.

For the same reasons, the Sections suggest that the prohibition or discontinuance of sales to price-cutting retailers (Part I, Chapter 2.4(4)) and restrictions on price advertising (Part I, Chapter 2.6(3)) not be blanket classified as “RPM” in light of their typically procompetitive effects. In the United States, manufacturers may implement “take it or leave it” policies and may coordinate promotional programs including price advertising, as they can enhance competition against other manufacturers. For the Revisions, the U.S. experience suggests these policies should be assessed for potential anticompetitive effects, even if RPM remains an “in principle” violation.

VIII. Vertical non-price restraints

The Sections comment on five of the Revisions’ vertical non-price restraint discussions in the order in which they appear in Part I, Chapter 2.

A. Restrictions on dealings with competitors

U.S. antitrust law recognizes that direct and indirect vertical restrictions against buying and distributing products manufactured by a supplier’s competitors frequently result in procompetitive benefits. Such exclusive dealing arrangements violate the antitrust laws only in limited circumstances, such as when they are imposed by a party with market power, resulting in substantial foreclosure of competition in a well-defined relevant market, or when multiple competitors actively collude in deploying similar restrictions with the objective of raising prices or limiting output or selection. In cases where such arrangements have been appropriately challenged, the exclusive dealing arrangements were typically in place over a long period and imposed in conjunction with incentives or punitive contractual terms designed to deter or even coerce buyers from dealing with the enterprise’s competitors.

The Revisions (Part I, Chapter 2.2) appear to recognize the potential procompetitive benefits of vertically-imposed restrictions on a trading partner’s dealings with competitors. At the same time, however, the Revisions broadly prohibit such restrictions when imposed by an “influential enterprise” when “foreclosure effects” result, except when there is “proper justification.” To explain what constitutes “influence” on the part of an enterprise, the Draft Guidelines point to a non-exclusive list of undefined factors such as the “brand value” of the products distributed by the enterprise and its competitors’ “lack of excess supply.” The Revisions further suggest that “foreclosure effects” are more likely in the presence of longer-term restrictions or restrictions that affect “more” competitors, and when transactions with the enterprise imposing the restrictions are “more important” to the trading partner, a factor that the

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32 See, e.g., Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997) (noting “well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition”); Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984) (“If . . . exclusive dealing leads dealers to promote each manufacturer’s brand more vigorously than would be the case under nonexclusive dealing, the quality-adjusted price to the consumer . . . may be lower with exclusive dealing than without, even though a collateral effect of exclusive dealing is to slow the pace at which new brands . . . are introduced.”).
Sections believe opens the door to a wholly subjective analysis. Other than two narrow and limited illustrative examples, there is no guidance as to what constitutes “proper justification” for an otherwise illegal restriction on dealings with competitors of the party imposing the restraint.

From the standpoint of an enterprise attempting to comply with the AMA, the Sections find the criteria for determining whether a proposed restriction is an unfair trade practice are subjective and unclear, and give undue weight to protecting intrabrand competition and individual competitors as opposed to protecting interbrand competition for the benefit of consumers. Without further clarification, the Sections are concerned that procompetitive and innovative incentive programs and distribution systems may be chilled. The Sections therefore recommend that the Revisions more clearly indicate that restrictions on dealings with competitors will not violate the AMA in the absence of actual adverse effects on interbrand competition and that they at least explain, if not dispense with, consideration of undefined factors such as brand value and relative importance. For the reasons noted above, the Sections recommend that the Revisions eliminate or better define what constitutes “foreclosure effects.” The Sections also recommend that the Revisions offer more detailed examples of justifications for restrictions on dealings with competitors.

**B. Restrictions on sales territories**

As with other areas of vertical restraints, under U.S. antitrust law, territorial restrictions are governed by the rule of reason.\(^{33}\) U.S. case law does not support special treatment for restrictions on Internet selling,\(^{34}\) and makes no distinction between restrictions on “active” versus “passive” sales to customers outside the supplier-designated territory.

The approach to ordinary territorial sales restrictions taken by the Revisions (Part 1, Chapter 2.3) is generally permissive. However, so-called “strict territorial restrictions,” are deemed illegal when imposed by “an influential enterprise” when they result in “price maintenance effects.”\(^ {35}\)

As noted above, the loosely-defined “influential enterprise” and “price maintenance effects” standards do not, in the Sections’ view, provide sufficiently clear guidance to companies in assessing the legal risk of a proposed restriction. Likewise, absent collusion, the fact that other companies are imposing similar, otherwise legal, restrictions should not weigh in favor of illegality.

The Revisions suggest that, because of their inherently limiting effect on intrabrand competition, restrictions on passive sales to customers outside the supplier-designated territory may be illegal regardless of whether the party imposing the restrictions is an influential

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\(^{34}\) *See generally ABA SECTION OF ANTITRUST LAW, ANTITRUST HANDBOOK FOR FRANCHISE AND DISTRIBUTION PRACTITIONERS* 111-12 (2008) (“Restrictions on Internet sales by franchisees or resellers are increasingly commonplace. … Generally speaking, the antitrust laws apply to e-commerce restraints to the same extent as to restraints affecting bricks-and-mortar businesses.” (footnote omitted)).

\(^{35}\) Note 7 describes a narrowly drawn safe harbor for localized test marketing and sales of local souvenirs.
enterprise; all that is required is a showing of “price maintenance effects.” Such treatment places undue weight on the protection of intrabrand competition at the expense of potential benefits to interbrand competition, to the ultimate detriment of consumers. The Sections recommend that so-called strict territorial restrictions, as well as restrictions on passive sales, should be governed by the same standard that governs every other territorial sales restriction. As stated above, the Sections believe that all such restrictions should be permitted absent actual substantial adverse effects on interbrand competition.

C. Restrictions on distributors’ trading partners

The Revisions (Part I, Chapter 2.4) indicate that restrictions on distributors’ choice of customers and/or sources or supply are illegal where such restrictions have “price maintenance effects” or where they “tend to impede price competition.” It does not appear to matter whether the party imposing the restriction is “an influential enterprise.” The Revisions indicate that restrictions on sales to designated retailers should be analyzed in the same manner as restrictions on passive sales to outside customers, even though the competitive effects of and business rationale for restricting sales to designated retailers may differ significantly from the competitive effects of and rationale for restricting passive sales to outside customers. The Revisions further indicate that prohibiting wholesale distributors’ sales to price-cutting retailers or discontinuing sales “on account of” price-cutting necessarily interferes with an enterprise’s free setting of its own prices and is therefore, in principle, illegal as an unfair trade practice.

As noted above, the Sections find the standards for determining whether certain conduct tends to reduce or eliminate price competition or has price maintenance effects to be unclear. Moreover, the test for illegality does not seem to require proof that any undesirable effects on competition (e.g., “price maintenance effects”) are actually occurring. In fact, a supplier’s preference for excluding price-cutting retailers from its distribution network may enhance interbrand competition by preserving the brand value of the supplier’s product. The Sections therefore respectfully suggest that the Revisions be amended to recognize that restrictions on distributors’ trading partners are non-price restraints warranting a more permissive approach.

D. Restrictions on retailers’ sales methods

The Revisions (Part I, Chapter 2.6) properly recognize the legitimate business interests supporting vertically-imposed restrictions on the methods that retailers use to sell the supplier’s product. The Sections also welcome the addition of examples that illustrate permissible restrictions on retailers’ sales methods. As noted above in the comments on Chapter 1, however, the Sections suggest that the JFTC reconsider the assumptions underlying its equating of price advertising restrictions with illegal resale price maintenance.

E. Tying

The U.S. Supreme Court has recognized that many tying arrangements “are fully consistent with a free, competitive market”36 and, as such, they are not illegal unless they are “the product of a true monopoly or a marketwide conspiracy,” supported by proof of power in

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the relevant market. Tying may be per se illegal where four requirements are met: (1) there are two products for which there is a separate demand; (2) the sale of the tying product is conditioned on the purchase of the tied product; (3) the seller possesses sufficient market power to appreciably restrain competition in the tied-product market; and (4) the transaction involves a not insubstantial amount of commerce. The essential characteristic of an illegal tying arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want, or might have preferred to purchase elsewhere on different terms.

The approach to tying outlined in the Revisions (Part I, Chapter 2.7) is more complicated, incorporating standards that are in some ways consistent and in other ways inconsistent with the discussion of what constitutes illegal tying contained in the JFTC’s 2009 Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, Part II, Section 4 (“Monopolization Guidelines”). For example, the Monopolization Guidelines expressly treat bundled discounts as a form of tying. In contrast, the Revisions do not appear to address bundled discounts. There are important differences between tying arrangements that expressly condition the availability of one product on the purchase of another, and bundled discounts, which offer a price incentive for buying two or more products together. The Sections recommend that the Revisions clearly indicate that they are narrowly focused on actual tying arrangements.

Under the Revisions, illegal tying rests on proof that “an influential enterprise” in the market for the tying product has compelled the purchase of the tied product in conjunction with the supply of the tying product, where such conduct “has foreclosure effects” in the market for the tied product. As noted above, the Sections believe the foreclosure effects test is far from clear, and could be susceptible to a conclusory analysis. In addition, the Sections believe the proposed explanation of what constitutes proof that customers have been “compelled” to purchase an allegedly tied product offers insufficient guidance to businesses and their advisors, as there is no indication of how to objectively measure whether “many” customers have been “compelled.” Without clarification, it could be assumed that “many” customers may comprise less than 50% of customers, and that proof of “compulsion” may be subjective and customer-specific.

In addition, Note 10 indicates that tying is “also” illegal “if it tends to impede freedom of choice” and is “unjustifiable” as a means of competition on the merits as to price, quality, or services. It is not clear to the Sections whether this latter statement is meant to define an independent standard of illegality or if other stated elements—an influential enterprise, foreclosure effects, etc.—must also be present.

In light of these observations, the Sections respectfully suggest that the Revisions clearly: (a) define what does and does not constitute a tying arrangement; (b) exclude bundled discounts from the scope of what constitutes tying; (c) articulate a single, well-defined and objective standard for assessing the legality of tying arrangements as unfair trade practices; and (d) reconcile that standard with the Monopolization Guideline standards that apply to tying.

37 Id. at 42-43.
39 Illinois Tool Works, 547 U.S. at 34-35.