FEDERAL TRADE COMMISSION

[File No. 071 0196]

Dick's Sporting Goods, Inc.; Analysis of Proposed Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before November 7, 2008.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''Dicks Sporting Goods, File No. 071 0196,'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room 135–H, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Comments containing confidential material must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with Commission Rule 4.9(c). 16 CFR 4.9(c) (2005).[1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments that do not contain any nonpublic information may instead be filed in electronic form by following the instructions on the web-based form at (*http://secure.commentworks.com/ftc-DicksSportingGoods*). To ensure that the Commission considers an electronic comment, you must file it on that web-based form.

The Federal Trade Commission Act (''FTC Act'') and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*)

FOR FURTHER INFORMATION CONTACT: Melissa Westman-Cherry, FTC Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, D.C. 20580, (202) 326–2338.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 of the Commission 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 thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for October 9, 2008), on the World Wide Web, at (*http://www.ftc.gov/os/2008/10/index.htm*). A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, D.C. 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Dick's Sporting Goods, Inc. (''Dick's'' or ''Respondent''). Dick's, through its wholly-owned subsidiary Golf Galaxy, operates a chain of golf superstores in the United States. The agreement settles charges that Dick's violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by agreeing with a potential competitor to allocate markets. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

Golf Galaxy operates a chain of golf superstores in the United States. Golf Galaxy stores offer a broad selection of golf merchandise and related services, including golf clubs, equipment, accessories, clothing, lessons, swing analysis, and golf club fitting. The founders of Golf Town Canada Inc. (''Golf Canada'') wished to launch a chain of golf superstores in Canada similar to the Golf Galaxy stores.

In June 1998, Golf Canada and Golf Galaxy entered into a consulting agreement (the ''1998 Agreement''). Golf Galaxy agreed therein: (i) to develop and present an initial training program for certain Golf Canada employees, (ii) to provide Golf Canada on an ongoing basis with useful business documents, including construction blueprints, merchandising plans, and sales reports, and (iii) to provide continuing consulting support to Golf Canada. In consideration for these consulting services, Golf Galaxy received shares of Golf Canada, a seat on the company's board of directors, and cash payments.

Certain provisions of the 1998 Agreement restrained Golf Canada from competing with Golf Galaxy. Specifically, Golf Canada was barred: (i) from operating any retail store in the United States during the term of the 1998 Agreement and for five years thereafter, and (ii) from engaging in any

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

business outside of Canada that competes with or is similar to the business of Golf Galaxy during the term of the 1998 Agreement and for two years thereafter.

Between 1998 and 2004, with the assistance of Golf Galaxy, Golf Canada opened thirteen retail locations in Canada.

In October 2004, Golf Galaxy sold its shares of Golf Canada and the parties terminated all consulting obligations effective immediately. Golf Galaxy and Golf Canada entered into a new contract (the ''2004 Amended Agreement'') that, *inter alia*, extended the duration of the restraints on competition beyond the expiration dates contemplated in the 1998 Agreement. The 2004 Amended Agreement bars Golf Canada: (i) from operating any retail store in the United States for nine years (until June 2013), and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy for six years (until June 2010). In addition, the 2004 Amended Agreement for the first time prohibits Golf Galaxy from opening a store in Canada (until June 2008).

II. Legal Analysis

There are two distinct sets of restraints in this matter.

One set was agreed upon by Golf Galaxy and Golf Canada in 1998 when their consulting relationship was launched. These restraints appear to have been reasonably necessary to the formation and/or efficient operation of the parties' collaboration. For example, Golf Canada's commitment not to compete in the United States during the term of the consulting relationship (and for five years thereafter) may have been necessary in order to induce Golf Galaxy to share with Golf Canada certain valuable, confidential, and proprietary information.[2] The Commission therefore does not challenge these 1998 restrictions.

The parties entered into a second set of restraints in 2004, contemporaneous with the decision to terminate their collaboration. The 2004 restraints provide for a division of markets well beyond the term contemplated in the 1998 Agreement, and are the subject of the Commission's claim in this matter. Under the 1998 Agreement, Golf Canada's undertaking to forgo competing in the United States would have expired five years after termination of the consulting relationship; since the consulting relationship ended in 2004, the noncompete would have expired five years later in 2009. With the 2004 Amended Agreement the noncompete was extended from 2009 until 2013—four years longer than what was contemplated under the original 1998 Agreement.

The 2004 Amended Agreement may be analyzed under the framework articulated by the Commission in the *PolyGram* case.[3] Agreements between competitors to divide markets are treated by the courts as presumptively anticompetitive, or inherently suspect. *E.g., Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (horizontal market division is unlawful per se); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (same); Timothy J. Muris, *The Rule of Reason After California Dental*, 68 Antitrust L. J. 527, 536 (2000) (''[C]ourts already consider price fixing and market division to be inherently suspect.''). When an agreement is deemed inherently suspect, the parties can avoid summary condemnation under the antitrust laws by advancing a legitimate (cognizable and plausible) efficiency justification for the restraint.[4]

Here, the Commission found reason to believe that the 2004 restraints serve no pro-competitive purpose. This second set of restraints was *not* reasonably necessary for the formation or efficient operation of the collaboration between Golf Galaxy and Golf Canada. Significantly, the 2004 restraints cannot be said to induce or facilitate cooperation between Golf Galaxy and Golf Canada—for the simple reason that, after 2004, no further cooperation was contemplated. These restraints served only to provide Golf Galaxy's shareholders with additional protection from competition, with no advantage to U.S. consumers. Because there is no efficiency rationale for the 2004 agreement between Golf Galaxy and Golf Canada to divide markets, such agreement constitutes an unreasonable restraint on trade, and is properly judged to be illegal.

Application of the ancillary restraints framework leads to precisely the same conclusion. The D.C. Circuit has explained:

> To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extend, not ancillary.[5]

The legitimate and competitive purpose of the consulting arrangement, in place from 1998 through 2004, was to enable Golf Canada to benefit from Golf Galaxy's experience and expertise. However, as alleged in the Complaint, the 2004 restraints did nothing to encourage, facilitate, or promote this collaboration. (Again, after 2004, no ongoing cooperation was contemplated.) Certainly, the dissolution of a collaboration does not, of itself, provide a rationale for the ex-partners to adopt new and expanded limitations upon future competition. *See Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (market division agreement adopted by lawyers following dissolution of their partnership judged per se unlawful). In short, the challenged restraints are naked rather than ancillary.

III. The Proposed Consent Order

Dick's (the parent of Golf Galaxy) has signed a consent agreement containing a proposed consent Order. The proposed consent Order enjoins the company from dividing or allocating markets for the retail sale of golf merchandise. In addition, the proposed Order will prevent Golf Galaxy from enforcing any noncompete provision beyond the date originally provided for in the 1998 Agreement. More specifically, the provision of the 2004 Amended Agreement prohibiting Golf Canada from operating any retail store in the United States will no longer be enforceable as of October 8, 2009, and thereafter. The prohibition on Golf Canada's engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy will no longer be enforceable as of thirty (30) days from the date on which the Order becomes final and thereafter.

The proposed Order would not interfere with the company's ability to enter into written agreements to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the sale of golf merchandise where such agreement is reasonably related to a lawful consulting arrangement or lawful joint venture agreement; and is reasonably necessary to achieve such agreement's procompetitive benefits.

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[2] *See e.g., Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985).

[3] *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005). *See also N. Tex. Speciality Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

[4] *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35–36 (D.C. Cir. 2005).

[5] *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986).

The proposed Order will expire in 20 years.

By direction of the Commission.

Donald S. Clark,

Secretary

[FR Doc. E8–24931 Filed 10–20–08: 8:45 am]

BILLING CODE 6750–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Meeting

ACTION: Meeting announcement.

SUMMARY: This notice announces the meeting date for the 25th meeting of the American Health Information Community in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.) The American Health Information Community will advise the Secretary and recommend specific actions to achieve a common interoperability framework for health information technology (IT).

Meeting Date: November 12, 2008, from 8:30 a.m. to 2:45 p.m. (Eastern)

ADDRESSES: Hubert H. Humphrey building (200 Independence Avenue, SW., Washington, DC 20201), Room 800.

SUPPLEMENTARY INFORMATION: The meeting will include updates on the Healthcare Information Technology Standards Panel, the Certification Commission for Healthcare Information Technology, and hospital health information technology adoption rates. Final reports on the Electronic Health Records, Chronic Care, Consumer Empowerment, Quality, and Personalized Healthcare Workgroups will also be presented. Finally, an update on the AHIC Successor organization will be heard.

For further information, visit *http://www.hhs.gov/healthit/ahic.html.*

A Web cast of the Community meeting will be available on the NIH Web site at: *http://www.videocast.nih.gov/.*

If you have special needs for the meeting, please contact (202) 690–7151.

Dated: October 15, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E8–24991 Filed 10–20–08; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute of Environmental Health Sciences (NIEHS); National Toxicology Program (NTP); Request for Information (NOT–ES–09–001): Ongoing Research and Research Needs for Biological Effects of Exposure to Bisphenol A (BPA)

AGENCY: National Institutes of Health (NIH).

ACTION: Request for information.

SUMMARY: The NIEHS Division of Extramural Research and Training (DERT) and the NTP are seeking input on a number of key research areas that have been identified in recent evaluations of bisphenol A (BPA). Information provided will be used to help focus future research and testing activities on BPA. This Request for Information (RFI) is for planning purposes only and should not be construed as a funding opportunity or grant program. The NIEHS and NTP welcome input from the lay public, environmental health researchers, healthcare professionals, educators, policy makers, industry, and others with an interest in BPA.

DATES: Please respond online at the Bisphenol A Request for Information Web page by December 1, 2008, at *http://ntp.niehs.nih.gov/go/rfibpa.*

FOR FURTHER INFORMATION CONTACT: Other correspondence regarding this RFI should be directed to either (1) Dr. Jerry Heindel, DERT Program Administrator, NIEHS, P.O. Box 12233, MD EC–23, Research Triangle Park, NC 27709, (phone) 919–541–0781, (e-mail) *heindelj@niehs.nih.gov* or (2) Dr. Paul Foster, NTP Acting Toxicology Branch Chief, NIEHS, P.O. Box 12233, MD EC–34, Research Triangle Park, NC 27709, (phone) 919–541–2513, (e-mail) *foster2@niehs.nih.gov.*

SUPPLEMENTARY INFORMATION:

Background

The NTP is an interagency program whose mission is to evaluate agents of public health concern by developing and applying tools of modern toxicology and molecular biology. The NTP was established as a cooperative effort to (1) Coordinate toxicology testing programs within the federal government, (2) strengthen the science base in toxicology, (3) develop improved testing methods, and (4) provide information about potentially toxic chemicals to health, regulatory, and research agencies, scientific and medical communities, and the public. To meet these goals, NTP designs and conducts large-scale laboratory animal research and testing programs and analyzes and reports its findings to assess potential hazards to human health from exposure to environmental agents. The NTP also carries out formal review and literature analysis activities.

The NIEHS mission is to understand the complex relationship between environmental risk factors and human biology within affected individuals and populations and to use this knowledge to prevent illness, reduce disease, and promote health. To accomplish this, the NIEHS supports research and professional development in environmental health sciences, environmental clinical research, and environmental public health. These extramural research and development activities are managed through NIEHS/DERT.

Recently, both the NTP and NIEHS/DERT conducted assessments related to understanding the potential human health and environmental risks posed by BPA. The NTP evaluation was conducted through its Center for the Evaluation of Risks to Human Reproduction (CERHR) and focused on whether current exposures may pose health risks to human reproduction and development. The final results of this evaluation were released on September 3, 2008, as the NTP–CERHR Monograph on Bisphenol A. The monograph and details of this evaluation are available at *http://cerhr.niehs.nih.gov/chemicals/bisphenol/bisphenol.html.* The NIEHS workshop, ''Bisphenol A: An Examination of the Relevance of Ecological, *In Vitro* and Laboratory Animal Studies for Assessing Risks to Human Health'' (for consensus statement see vom Saal *et al.*, Reproductive Toxicol. 2007. 24:131–138) was co-sponsored with a number of other organizations and was broader in scope compared to the NTP–CERHR evaluation as it included consideration of ecological effects and human health effects not directly related to development or reproduction.

The NTP and NIEHS review activities resulted in a number of research recommendations to better characterize the sources and levels of human exposures to BPA and to help determine what, if any, adverse health effects might result from such exposures. Similarly, a number of research needs have been identified by the Food and Drug Administration in its draft assessment of BPA in food contact applications (*http://www.fda.gov/ohrms/dockets/ac/oc08.html#Scienceboard* see ''Science Board to the Food and Drug