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FEDERAL TRADE COMMISSION

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COMMISSION AUTHORIZED

March 7, 1988

Carole Cooke
Rules and Policy Manager
Oregon Liquor Control Commission
P. O. Box 22297
Portland, Oregon 97222

Dear Ms. Cooke:

The Seattle Regional Office and the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission are pleased to have the opportunity to comment on Section 845-10-210 ("Section 210") of the rules of the Oregon Liquor Control Commission.[1] The Liquor Control Commission is in the process of reviewing its rules to determine whether any of its requirements are unnecessary, unduly costly or needlessly burdensome.[2] At present, the Liquor Control Commission has requested public comments on Section 210, which governs price posting.[3] We commend the Liquor Control Commission's efforts to conduct this review of its rules and are pleased to respond to the Commission's request for public comments on Section 210. We hope that our comments will be useful in examining the likely competitive consequences of the current price posting requirements. Our conclusion is that the deletion or substantial restriction of the posting requirements would materially increase competition and advance the interests of Oregon consumers.

Section 210 requires manufacturers and wholesalers of beer and wine to post (i.e., file) their prices with the Liquor Control Commission. Section 210 also restricts the ability of

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[1] These comments represent the views of the staff of the Federal Trade Commission. They do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments to you.

[2] Periodic Rules Review Notice, Oregon Liquor Control Commission (Oct. 16, 1987).

[3] Notice of Proposed Rulemaking Hearing, Oregon Liquor Control Commission (Feb. 1, 1987).

manufacturers and wholesalers of beer and wine to change their prices. For example, under Section 210, manufacturers and wholesalers cannot change their posted prices for ten days after notifying the Commission of the proposed change. Furthermore, with only limited exceptions, a posting of a lower price for beer must remain in effect for 90 days after the effective date of posting, while a similar wine posting must remain in effect for 30 days. Finally, all retail posted prices must be delivered prices and must be the same for all retailers, regardless of variations in the costs of delivering products to different retailers. Penalties for violations of these restrictions may include the cancellation or suspension of the licensee's license or the imposition of monetary penalties.[4]

These restrictions on the prices that manufacturers and wholesalers of beer and wine may charge for their products may raise prices to consumers by deterring price reductions, raising costs and impeding the development of efficient systems of distribution. In addition, these restrictions may facilitate collusion. The anticompetitive consequences of the restrictions may not be offset by countervailing benefits for consumers, nor do the restrictions seem necessary to fulfill the goals of the Oregon statutes. Instead, it is possible that the primary goal of price posting -- deterring manufacturers and wholesalers from providing financial assistance to particular retailers[5] -- could be achieved through recordkeeping or other less restrictive requirements.

I. Interest and Experience of the Federal Trade Commission

The Federal Trade Commission is empowered under Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. In addition to enforcing Section 5 and other laws dealing with competition, the Commission has frequently authorized its staff to submit comments on the likely competitive consequences of federal, state and local legislation or regulations. Several of these staff comments have analyzed the competitive implications of proposed legislation or regulations governing the distribution of alcoholic beverages.[6]

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4 Ore. Rev. Stat. § 471.315 (1985).

5 See Notice of Proposed Rulemaking, Oregon Liquor Control Commission (Oct. 16, 1987). In these comments, we take no position on the likely competitive effects of the statutory prohibitions of financial assistance.

6 See, e.g., Comments of the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission on the Maryland Wine Cooler Fair Dealing Act (Mar. 11, 1987); Comments of the Bureaus of Competition, Consumer Protection and Economics (continued...)

In analyzing particular statutes or regulations, our goal is to assess whether various restrictions impede competition or increase costs without providing countervailing benefits to consumers.

Restrictions on price are particularly appropriate subjects for competitive analysis since price has long been recognized as "the central nervous system" of a free market economy.[7] In competitive markets, changes in price operate as signals to bring the output of producers (supply) into equilibrium with consumer needs (demand). If, for example, consumers want to buy more of a product than the market is currently providing, producers will generally increase price in response to the high demand. Such price increases will tend to reduce consumer purchases while signalling the need for additional output. Conversely, if producers have excess inventory, they will generally lower their prices in order to stimulate consumer purchases. Such price reductions typically will also lead producers to decrease output. Restrictions on price changes directly interfere with these essential market signals and prevent the market from allocating resources in a manner that maximizes consumer welfare. By inefficiently allocating resources, such restrictions are likely to result in higher prices, inferior products, or reduced services. Because of these likely adverse consequences, such restrictions, when adopted by private competitors, would run the risk of being summarily condemned under the antitrust laws.[8]

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[6](...continued)
of the Federal Trade Commission on the District of Columbia Wine, Beer and Spirits Franchise Act (Aug. 29, 1986); and Petition of the Seattle Regional Office, Federal Trade Commission Before the Washington State Liquor Control Board for Repeal of Rules Affecting Price (Feb. 17, 1977).

[7] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26, n.59 (1940).

[8] If imposed by an agreement of competitors, pricing restrictions of the type contained in Oregon's price posting regulations would almost certainly violate the antitrust laws. See, e.g., Miller v. Hedlund, 813 F.2d 1344, 1349 (9th Cir. 1987), cert. denied, 56 U.S.L.W. 3568 (Feb. 23, 1988) ("If the wholesale beer and wine distributors had entered into a private agreement to accomplish what is otherwise required by the Oregon [price posting] regulations, there is no question that a per se violation of Section 1 of the Sherman Act would be found.")

In Miller, the Court of Appeals held that the Oregon price posting requirements would be preempted by the Sherman Act unless they are protected by the 21st Amendment. The Court of Appeals remanded the case to the District Court for further consideration of the 21st Amendment issues. In the meantime, the Liquor
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Like private restrictions on price, government-imposed price restrictions may harm competition by directly interfering with the price signals needed for the market system to work. In addition, government restrictions on price may raise the costs of producing or distributing particular products. Finally, government restrictions on price may enable private parties to use the enforcement power of the state to strengthen private price-fixing agreements. Government restrictions can be effective in facilitating private price-fixing conspiracies if violations of such restrictions subject noncomplying parties to penalties that are more certain or severe than retaliation by private parties. For example, many government agencies, including the Liquor Control Commission, have the authority to cancel or suspend a licensee's license or impose monetary penalties for violations of the agency's regulations.[9]

We recognize, of course, that government-imposed restrictions on price may be designed to achieve legitimate state goals.[10] Since, however, government-imposed restrictions on price may also adversely affect consumers by raising price and wasting resources, it is useful to examine such restrictions carefully to ensure that they do in fact achieve legitimate state goals without unnecessarily restricting competition.

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8 (...continued)
Control Commission is reviewing its price posting requirements (several of which are at issue in Miller) to determine whether these requirements are unduly burdensome or unnecessary to fulfill the relevant statutory goals.

9 The Oregon Liquor Control Commission has the authority to impose such penalties if it finds or has reasonable grounds to believe that the licensee has violated any of its regulations, including the price posting requirements. Ore. Rev. Stat. § 471.315 (1985).

10 For example, government-imposed restrictions on price may be designed to restrain monopoly pricing. In addition, we recognize the important role played by the state in promoting the well being of its citizens and do not contend that a state should not regulate the sale of alcoholic beverages to promote temperance. There may be, however, means to accomplish this goal that do not limit the benefits of competition. For example, one alternative method of promoting temperance that might not have an adverse effect on competition would involve using tax revenues from the sale of alcoholic beverages for educational programs, such as alcohol abuse prevention programs.

II. Competitive Analysis of the Price Posting Requirements of Section 210

In this section, we first briefly review the content and goals of the price posting requirements set forth in Section 210. We then discuss four specific aspects of Section 210 that may harm competition by interfering with pricing signals, increasing costs, or strengthening private agreements on price. In Section III, we discuss alternate means of achieving the goals of the price posting requirements while reducing the potential for competitive injury.

A. Price Posting Requirements Of Section 210

As indicated earlier, Section 210 requires manufacturers and wholesalers of beer and wine to post their prices with the Liquor Control Commission. These price postings are available for public inspection. Manufacturers and wholesalers may change their posted prices by filing amended price postings. However, new or revised price postings cannot go into effect until ten days after posting. Furthermore, beer postings that decrease price must generally remain in effect for 90 days, while wine postings that decrease price must remain in effect for 30 days. Manufacturers or wholesalers may post different prices for wholesale sales and for retail sales, but must charge the same price to all wholesalers and the same price to all retailers. For retail sales, the posted price must be the delivered price.

The price posting requirements set forth in Section 210 are neither mandated nor specifically authorized by statute. Instead, it is our understanding that these requirements were adopted in order to make it difficult for manufacturers and wholesalers to circumvent Sections 471.415 and 471.465 of the Oregon statutes.[11] Section 471.415 prohibits retailers from receiving "assistance financially, or in any other material manner" from wholesalers or manufacturers, except as permitted in Section 471.465. Section 471.465 prohibits manufacturers or wholesalers from supplying any retailer with substantial gratuities; finances, money, credit, discounts or rebates; fixtures, furniture or furnishings; or equipment or services (other than specifically enumerated services, such as stock inspections, that are furnished to all retailers without discrimination). It is our understanding that these statutory provisions were designed to ensure that manufacturers and

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11 *See* Notice of Proposed Rulemaking Hearing, Oregon Liquor Control Commission (Feb. 1, 1988).

wholesalers do not discriminate among retailers by giving price or nonprice preferences to favored retailers.[12]

The price posting requirements set forth in Section 210 are intended to make it more difficult for manufacturers and wholesalers to circumvent these statutory prohibitions on price discrimination.[13] For example, the 30 and 90 day waiting periods make it difficult for sellers to change their prices so quickly that only favored retailers learn of the price reductions in time to take advantage of the lower prices. The ten day waiting period before posted prices can go into effect, combined with the public availability of posted prices, may further ensure that retailers, as well as the Commission, have ample notice of the availability and effective dates of low prices.[14] Finally, the requirement that there be only one price -- a delivered price -- to all retailers may make it easier for retailers and the Commission to detect possible price discriminations.

These restrictions on price are, however, also likely to reduce competition among manufacturers and wholesalers and to lead to higher retail prices for beer and wine. In the next section, we discuss several aspects of Section 210 that are particularly likely to harm competition.

B. Competitive Effects of Particular Restrictions in Section 210

The three restrictions set forth in Section 210 that are most likely to harm consumers are the requirement that price postings that decrease price must remain in effect for 30 days

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[12] These provisions may also help ensure that manufacturers and wholesalers do not use indirect forms of ownership to circumvent the statutory prohibition on the direct ownership of retailers by manufacturers and wholesalers. Prohibitions on direct ownership are set forth in Or. Rev. Stat. § 471.455 (1985) and Or. Admin. R. §845-10-128 (1987).

[13] By making it more difficult for manufacturers and wholesalers to grant price preferences, these provisions may increase the incentive for manufacturers and wholesalers to grant nonprice preferences. However, other provisions of the Commission's rules are designed to prevent such grants of nonprice preferences. See, e.g., Or. Admin. R. § 845-10-121 through 845-10-127 (1987).

[14] In the past, the Liquor Control Commission also used this ten day period to review price postings for possible violations of the 30 and 90 day waiting periods or other Commission regulations. It is our understanding, however, that the Commission no longer performs this preliminary review and that the ten day waiting period is therefore no longer needed for this purpose.

for wine and 90 days for beer; the requirement that posted prices cannot go into effect until ten days after posting; and the requirement that manufacturers and wholesalers post only delivered prices to retailers. The requirement that posted prices be made publicly available may also cause competitive injury under some circumstances. In this section, we discuss each of these restrictions in turn.

1. Requirement That Wine and Beer Postings That Decrease Price Remain In Effect for 30 and 90 Days, Respectively

The requirement that wine and beer postings that decrease price remain in effect for 30 and 90 days, respectively, is likely to harm competition by prohibiting short-term price reductions, by increasing the risks associated with any other price reductions, and by elevating the average price of beer and wine.[15] In addition, by deterring industry members from initiating price cuts, this requirement may promote collusion in highly concentrated markets.

In effect, this requirement prohibits price reductions of less than 30 days for wine and 90 days for beer. Such short-term price reductions are, however, often essential to the efficient functioning of the marketplace. For example, manufacturers or wholesalers may wish to reduce prices for short periods in order to quickly sell off excess inventory of products, such as beer, that would otherwise reach their expiration date and need to be discarded.[16] Manufacturers or wholesalers may similarly wish to implement short-term price reductions to reflect temporary cost reductions, to promote their products, or to conduct market tests. In many instances, price reductions of these types could not be justified for 30 or 90 day periods. Prohibiting shorter-term price reductions would therefore eliminate these price reductions and result in consumers paying higher prices for beer and wine than they would if price were free to vary. Moreover,

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[15] In this section, we identify the most likely consequences of the 30 and 90 day waiting periods. As discussed above, however, the essential problem with pricing restrictions of this type is that they distort the price signals needed for the market to function efficiently. The specific consequences identified in these sections should not therefore be viewed as a comprehensive list of potentially negative effects on efficiency.

[16] *See* Comments of Miller Brewing Company Concerning the Time Limit for "Post-Offs" under OAR 845-10-210 (Dec. 15, 1987). In its comments, Miller also notes that even if wholesalers post a lower price in order to clear excess inventory, the 90 day waiting period allows retailers to wait to place their orders until the overstock inventory has passed its shelf date. As a result, distributors may be forced to destroy thousands of dollars in unmarketable beer.

prohibiting such price reductions may result in the destruction of excess inventory or the failure to conduct valuable market tests or promotional activities.

In addition to banning short-term price reductions of these types, the 30 and 90 waiting periods are likely to deter other price reductions by greatly increasing the attendant risks. In effect, these waiting periods commit sellers to reduced prices for extended periods regardless of subsequent changes in market conditions. In many instances, it may be difficult to forecast supply and demand conditions for such extended periods. The demand for beer, in particular, may vary considerably over a holiday season, depending on the weather. Furthermore, unexpected changes in supply conditions, such as increases in raw material or transportation costs, could injure sellers that had posted lower prices that were binding for 30 or 90 days. Miscalculations of the extent to which price reductions would spur demand could also cause significant financial injury to manufacturers that posted price reductions.[17] By increasing the risks of posting price reductions, the waiting periods are likely to deter price reductions of all types, resulting in higher prices to consumers.[18]

Finally, the requirement that price reductions stay in effect for 30 or 90 days may promote collusion among wholesalers or among retailers by deterring industry members from initiating price reductions that would undermine a collusive price. In general, collusive pricing agreements are most likely to break down as a result of price cutting by an industry member who anticipates that it can make higher profits by reducing price and increasing sales. However, the 30 and 90 day waiting periods tend to reduce the likelihood that a price cutting strategy will be successful.

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[17] If, for example, a reduction in price did not increase demand significantly, keeping that price in effect could cause significant losses for sellers who had counted on increased sales to offset the decreased per unit price. Similarly, unexpected increases in demand might force sellers to sell regular, rather than excess, inventory at reduced prices or to quickly increase supply, possibly at substantially increased costs.

[18] Furthermore, Section 210 will tend to raise prices, on average, by imposing 30 or 90 day waiting periods only on price reductions. Under this section, suppliers may raise their prices as frequently as they choose, subject only to the ten day advance notice provision (discussed below). Suppliers that lower price, on the other hand, are locked into the lower posted prices for 30 or 90 days, regardless of subsequent changes in market conditions. By penalizing price reductions but permitting prices to rise relatively freely, Section 210 will tend to cause the average price level to be higher than it would otherwise be.

Facilitating collusion may be a concern in beer distribution, in part because Oregon's statutes require manufacturers to establish exclusive territories for their wholesalers.[19] Furthermore, beer wholesalers often serve as the exclusive distributor for more than one manufacturer. As a result, only a few beer wholesalers operate in each geographic territory. Such highly concentrated markets may be conducive to explicit or tacit agreements on price.[20]

Should such agreements occur, the 30 and 90 day waiting periods may reduce the likelihood that the collusive price will be undermined by price cutting. As indicated earlier, the waiting periods prohibit short-term price reductions and increase the attendant risks of all price reductions. In the context of collusion, these waiting periods could also increase a price cutter's exposure to retaliatory pricing by forcing the price cutter to keep a price cut in effect for an extended period even if, after retaliation, it is no longer profitable. The original price cutter may be particularly vulnerable to retaliation if Section 210 is interpreted to prohibit the original price cutter from further lowering its price during the 30 or 90 day waiting period in response to retaliatory price cuts by its competitors.[21]

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[19] Under Oregon state law, "intrabrand" competition (i.e., competition within the same geographic territory from wholesalers of the same brand of beer) is prohibited. The only permissible type of competition is competition from competing brands ("interbrand" competition).

[20] The ability of beer wholesalers to collude successfully on price may also be enhanced by the fact that the sale of distilled liquor, a possible substitute for beer, is a state-controlled monopoly. In Oregon, the state is the only wholesaler of distilled liquor and sets all retail prices for these products. Hence, retailers of distilled liquor are not allowed to price competitively. Even if distilled liquor is viewed as a close substitute for beer, therefore, competitive pressures from retailers of distilled liquor cannot be counted on to restrain beer wholesalers and retailers from raising their prices above the competitive level.

[21] A literal reading of Section 210 appears to support this interpretation. Furthermore, it is our understanding that the Liquor Control Commission has sometimes interpreted Section 210 in this manner. Under this reading, if competitors post a price under the price posted by the original price cutter, the original price cutter will be unable to meet the competitors' prices for the remainder of the 30 or 90 day waiting period. Such a policy would place the original price cutter in a very unfavorable market position and would be likely to deter industry members from being the first to undercut a collusive price.

In addition, the 30 and 90 day waiting periods reduce the incentives for industry members to undercut a collusive price by decreasing the likelihood that retailers will immediately purchase large quantities of goods from the original price cutter. Since retailers know that the price cutter's prices are guaranteed for a 30 or 90 day period, retailers may elect instead to wait and see whether suppliers of competing brands will meet or beat the reduced price.[22] Retailers may then choose to purchase reduced-price products from other industry members who meet or beat the initial price cut, rather than from the original price cutter. Under these conditions, the initial price cutter may receive little or no benefit from its price cutting strategy.

For these reasons, the waiting periods are likely to reduce significantly the expected benefits of price cutting, thereby deterring industry members from initiating price cuts and increasing the likelihood that collusion will be successful.[23]

2. Ten Day Waiting Period Before Posted Prices Go Into Effect

The ten day waiting period before posted prices go into effect may harm competition both by delaying price changes and by giving ten days notice of proposed price changes to competitors.

The requirement that sellers refrain from changing their prices for ten days after posting a new price prevents sellers from responding quickly to short-term shifts in supply or demand. Such delays prevent the market from using price signals to adjust the output of producers and the purchases of consumers in a timely and efficient manner. For example, in an unrestricted market, beer producers with excess inventory might be inclined to reduce their prices quickly, thereby increasing consumer purchases. The ten day waiting period, however, prohibits producers from implementing these price changes immediately and hence prevents the market from making the appropriate adjustments for at least ten days.[24]

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[22] Without these waiting periods, retailers may order quickly from the initial price cutter because they will not know how long the price cut will remain in effect, or whether or when the price cut will be matched.

[23] The disparity between the 30 day waiting period for wine and the 90 day waiting period for beer is also of competitive concern because it may place sellers of beer at a competitive disadvantage vis-a-vis sellers of wine. We are not aware of any economic basis for this distinction.

[24] The ten day waiting period may cause some sellers to refrain from changing their prices at all. Since, for example,

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The ten day waiting period should not, moreover, be viewed as merely a one-time, temporary problem that will be resolved at the end of ten days. To the contrary, if market conditions change again during the ten day period, the price posted at the beginning of that period will be outdated by the time it goes into effect.[25] Accordingly, if beer and wine markets are frequently subject to significant changes in market conditions that are not fully predictable,[26] the ten day waiting period may cause long-term, systemic distortions of the pricing system.[27] Indeed, if change is frequent enough, market prices may rarely reflect current market conditions, causing persistent resource misallocation and consumer injury.

The ten day waiting period may also harm competition by giving competitors ten days notice of prospective price changes.

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a supplier may not know whether excess supply will remain at the end of the ten day waiting period, the supplier may not want to post a price reduction that might not be warranted by the time it goes into effect. Even if the Liquor Control Commission permits suppliers to withdraw posted price reductions during the ten day waiting period, such withdrawals may not be practical from a business perspective if retailers have already taken the posted reductions into account in planning orders and promotions.

25 If sellers were able to forecast supply and demand conditions ten days in advance, the ten day waiting period would not be a problem, for producers would simply file all price changes ten days in advance of any significant shift in supply or demand. In most markets, however, changes in supply and demand are not so predictable. Indeed, in most markets, producers react to such changes after the changes have occurred, rather than ten days in advance.

26 Such market changes would, for example, include inventory excesses or shortfalls at the end of long weekends, holiday seasons or major sports events. Excess inventory may also arise if competitors have conducted particularly successful product promotions or if a firm's own promotions have been less successful than anticipated.

27 In some instances, even the short-term effect of the ten day waiting period may be significant. For example, if at the end of a holiday season, a manufacturer or wholesaler has a substantial excess inventory of beer whose shelf life is about to expire, the ten day waiting period prohibits the manufacturer or wholesaler from dropping its price immediately in order to sell the beer before its expiration date. If the time remaining after the ten day waiting period has expired is not sufficient to sell off the excess inventory, some or all of the beer may have to be destroyed.

In highly concentrated markets, such notice may promote collusion by reducing the incentive for any party to a price-fixing agreement to be the first to cut prices. In general, the greatest gains from price cutting are likely to occur between the time that the price cutter offers the reduced price and the time that other wholesalers are able to respond to the price reduction. Providing ten days notice to competitors of prospective price cuts is likely to reduce or even effectively eliminate this interval by giving competitors the opportunity to post their own price reductions before the original price reduction even goes into effect.[28] As a result, the ten day waiting period may decrease the incentives of industry members to initiate price cuts and increase the likelihood that explicit or implicit price fixing agreements can be successful.

3. Requirement that Manufacturers and Wholesalers Post Only Delivered Retail Prices

Under Section 210, manufacturers and wholesalers of beer and wine are required to post uniform delivered prices for all retailers. By prohibiting sellers from recognizing or rewarding efficiencies or cost savings in various methods of distribution, this requirement raises costs to some retailers. For example, retailers that pick up their own purchases or that place orders sufficiently large to reduce delivery costs cannot receive the benefit of these cost savings. The adverse effects of this policy are twofold. First, because cost savings are not recognized, retailers that have lower delivery costs cannot pass the cost savings on to consumers. Second, because the cost savings are not rewarded, retailers have little incentive to develop or implement more efficient means of transporting beer and wine. Consequently, the retail distribution of beer and wine is more likely to be inefficient, resulting in higher prices to consumers.[29]

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[28] In a market that does not have a ten day waiting period, a price cutter may offer a significantly reduced price to retailers without advance notice. Since retailers do not know whether or when that lower price will be matched by other suppliers, retailers will have considerable incentive to purchase significant quantities of the reduced-price product from the initial price cutter. With a ten day waiting period, however, competing sellers that wish to meet or beat the reduced price may post their own reduced price immediately. Although they too will have a ten day waiting period, they can vigorously promote their own price reduction during this interval, thereby reducing the likelihood that retailers will place large orders with the initial price cutter.

[29] Revisions to the delivered pricing rule in Section 210 would probably also require conforming revisions to Section 845-06-90 of the Commission's regulations. Or. Admin. R. § 845-06-
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4. Information Exchange Aspects of Price Posting

The price posting requirements set forth in Section 210 provide competitors with complete current information about one another's prices. In addition, these requirements give industry members ten days advance notice of their competitors' proposed price changes. Section 210 also requires manufacturers and wholesalers to adhere to their posted prices and subjects those who do not comply to severe penalties.[30]

Particularly in markets that are susceptible to collusion, the availability of comprehensive price information tends to make it easier for industry members to coordinate prices and to detect and discourage cheating on any collusive price.[31] The availability of such information discourages cheating in part by increasing the likelihood that competitors will quickly discover the price cut and retaliate by meeting (or beating) the reduced price.[32] In addition, in this market, once competitors post a collusive price, the state will enforce that posted price, thereby ensuring that all industry members adhere to the

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090. It is unclear whether similar delivered pricing restrictions apply to sales to wholesalers. If they do, such restrictions would produce similar anticompetitive effects on the wholesale level.

[30] The information made available under Section 210 differs in nature from the pricing information that is often available from trade journals or other industry sources both because it includes advance notice of proposed price changes and because the state penalizes firms that deviate from the posted information.

[31] In fully competitive markets, the provision of quick, accurate information generally tends to be procompetitive. Indeed, perfect information is one of the underlying assumptions of the competitive model. Liquor markets may not, however, fit the competitive model well. As discussed above, liquor markets may be conducive to collusion because concentration is high in some segments, entry is restricted by statute, and the government imposes sanctions on deviations from posted prices. Price posting may have adverse effects on efficiency in this regulated market.

[32] If the information disseminated through price posting were also available from trade journals or other independent sources (i.e., sources that did not in turn rely upon price postings to obtain or verify their information), the information disclosure aspects of Section 210 would have no adverse effect on efficiency. It seems unlikely, however, that nongovernmental sources could provide the comprehensive information provided under Section 210.

collusive price. Such government enforcement will reduce the costs to participants of enforcing the price-fixing agreement and increase the likelihood that collusion will be successful.

III. Alternate Means of Achieving the Goals of Section 210

As indicated earlier, the price posting requirements of Section 210 are not mandated or specifically authorized by statute. Instead, these requirements were designed to make it easier to enforce the statutory prohibitions on providing financial assistance to favored retailers. In these comments, we take no position on the likely competitive effects of particular statutory prohibitions on price discrimination, but address instead whether the current price posting system is needed for the effective enforcement of Oregon's statutory requirements. In reviewing the usefulness of the current price posting system, the Liquor Control Commission may wish to balance any enforcement benefits of price posting against the administrative and other costs that the price posting system imposes both on the Commission and on private parties.[33] In addition, the Commission may want to balance such enforcement benefits against the higher prices that are likely to result from the current price posting requirements.

While price posting may make it somewhat easier for the Commission to determine whether the prices charged by wholesalers or manufacturers to particular retailers are discriminatory, the enforcement benefits of price posting do not seem large. Instead, it seems likely that the statutory prohibitions on price discrimination could be effectively enforced through less expensive recordkeeping requirements, combined with appropriate enforcement.[34] Section 171 of the Commission's current

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[33] Since we do not have information on the magnitude of these costs, we do not undertake such a cost-benefit analysis in these comments. We would, however, expect that the administrative and compliance costs of price posting would be substantial.

[34] Complaints about preferential prices typically come from retailers who feel that other retailers have received a lower price. With price posting, the Commission can determine the prices that the seller "should have charged" during the applicable time period from its own files. Without price posting, the Commission would have to contact the retailer that allegedly received the price break or the seller that allegedly gave the price break in order to begin its investigation. Since, however, it is our understanding that the Commission's staff already routinely makes such contacts in investigating price discrimination complaints, deleting the price posting requirement probably would not significantly increase the Commission's costs of investigation.

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regulations already requires manufacturers and wholesalers to keep extensive records on each sale or delivery of beer or wine, including records of every rebate, discount or allowance for the return of empty containers. Such a recordkeeping system would seem fully adequate for purposes of enforcing the statutory prohibitions on financial assistance, yet is much less likely to harm competition than the current price posting requirements.

In the alternative, a price posting requirement that omitted the 30 and 90 day periods during which decreased prices must be kept in effect, did not require a ten day waiting period for price postings to become effective, and did not impose a delivered pricing rule would seem to achieve virtually all the goals of the present regulations without creating the likely anticompetitive effects of the current price posting requirements. Eliminating the policy of making all price postings public might also reduce the harm to consumers occasioned by the rule.[35]

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Another possible advantage of the current price posting rules is that the various waiting periods contained in those rules prevent wholesalers from posting a low price for a very short period, such as a few days or a week, in order to offer the low price to only one or two retailers. If the Commission found this to be a significant concern, however, it could specifically require that any manufacturer or wholesaler that lowers its price give all of its customers the opportunity to purchase products at the lower price. Manufacturers and wholesalers could also be required to indicate, upon request, the manner in which all customers were notified of the lower price.

A final possible advantage of price posting is that the public availability of prices may increase the likelihood that purchasers will notice and report possible violations, thereby deterring sellers from granting price preferences. Since, however, retailers tend to learn about preferential prices given to others through a variety of industry sources, it is not clear that price posting is necessary for the detection and deterrence of price discrimination. Instead, the penalties that the Commission imposes for price discrimination, combined with appropriate investigation of retailer complaints, would seem sufficient to deter price discrimination.

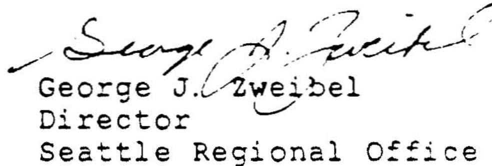
[35] The likelihood that competitive injury might flow from the public availability of price postings depends upon the other provisions of the price posting regulation. If, for example, the ten day waiting period were deleted, it would be less likely that the public availability of price information would cause significant competitive harm.

IV. Conclusion

For the reasons set forth above, the price posting requirements contained in Section 210 of the Liquor Control Commission's administrative rules may harm competition and raise prices without providing countervailing benefits to consumers. In addition, these provisions do not seem necessary to attain the apparent goals of the statutes that they were designed to implement. Although consumer welfare may be advanced best by eliminating Section 210 in its entirety, deleting from Section 210 the ten day waiting period before price postings may become effective, the 30 and 90 day periods during which decreased prices must be kept in effect, and the requirement that manufacturers offer only delivered prices could also be beneficial. Deleting the requirement that posted prices be made publicly available may also enhance competition in this market.

We appreciate this opportunity to comment on the Commission's proposed rules. Please feel free to call or write if we can be of any further assistance.

Sincerely,



George J. Zweibel
Director
Seattle Regional Office