



# Department of Justice

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## **DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION TO HOLD WORKSHOP ON CONDITIONAL PRICING PRACTICES**

### *Topics will Include the Law and Economics of Loyalty and Bundled Pricing*

The Department of Justice and the Federal Trade Commission (FTC) will hold [a joint public workshop](#) on June 23, 2014, to explore the economic and legal analysis of conditional pricing practices among firms in a supply chain. The workshop will focus on conditional pricing arrangements – practices in which prices are explicitly or effectively contingent on commitments to purchase or sell a specified share or volume of a single product or a mix of multiple products – such as loyalty or bundled pricing.

A principal goal of the workshop will be to advance the economic understanding of the potential harms and benefits of conditional pricing practices and to reexamine their treatment under the antitrust laws.

Conditional pricing practices, similar to other distribution strategies, may have anticompetitive effects and efficiency benefits. For example, if a loyalty or share discount induces buyers to make most or all of their purchases from the seller, under some circumstances it might deprive the seller's rivals of sufficient access to efficient distribution or production and facilitate the seller's exercise of market power. Similarly, bundled pricing can deny rivals that do not produce all of the products in the bundle efficiencies of scale or scope. Supporters of such arrangements contend, however, that as long as these practices involve prices that are above some measure of cost, they are likely to reflect beneficial price competition, and that restraining their use will inhibit robust competition.

The legal treatment of conditional pricing practices has traditionally fallen into two categories. The first focuses on pricing and applies various forms of a price-cost test. The second examines whether a particular pricing practice reduces competition by raising the costs of rival firms or otherwise impeding their ability or incentives to expand or achieve efficiencies. These effects on competition could be comparable to those resulting from other distribution practices, such as exclusive dealing or tying.

Economic Learning. Workshop participants will examine both theoretical and empirical economic learning regarding these arrangements and consider many questions, including:

- What are the economic theories of harm and benefit?
- What do the economic and business-strategy literatures tell us about how and with what frequency firms employ conditional pricing practices?
- Under what circumstances are the various conditional pricing strategies likely to lead to competitive harm?
- In what settings might conditional pricing practices allow firms to realize efficiencies?
- To what degree might less-restrictive alternatives enable firms to achieve those same efficiencies?

Law and Policy Issues. Participants also will consider how to integrate the economic learning with the relevant legal standards. To that end, the workshop will explore the current legal standards in the United States and abroad and will consider a number of questions, including:

- How has the treatment of various conditional pricing practices evolved in the courts?
- To what extent do the standards articulated in judicial decisions align—or fail to align—with the relevant theories of competitive harm and benefit?
- What are the practical challenges of proof that the courts and litigants have confronted when attempting to apply the different legal standards?
- Do price-cost tests provide certainty and predictability to firms?
- How do price-cost tests compare to other alternative tests?
- Under the various standards, how might misalignment with theory and challenges of proof threaten to under-deter harmful practices or over-deter beneficial conduct?
- How do the various legal standards, if at all, affect primary conduct?
- What legal standards should the courts and antitrust agencies apply to the various conditional pricing strategies and theories of competitive harm?

The Department of Justice and the FTC are interested in receiving comments on conditional pricing practices and will accept written submissions from now through Aug. 22, 2014, 60 days after the event. Interested parties may submit public comments to <https://ftcpublishcommentworks.com/ftc/conditionalpricingworkshop>. Submitted comments will be made publicly available on the Department of Justice and FTC websites.

The all-day workshop is free and open to the public. Individuals are encouraged, but not required, to register in advance for the workshop by sending an email to [CPPworkshop@ftc.gov](mailto:CPPworkshop@ftc.gov). Please include “RSVP” in the subject line. Seating will be on a first-come, first-serve basis.

Reasonable accommodations for people with disabilities are available upon request. Requests should be submitted by e-mail to [lkittelson@ftc.gov](mailto:lkittelson@ftc.gov) or by calling Lara Kittelson at 202-326-3388. Requests should be made in advance. Please include a detailed description of the accommodation needed and provide contact information.

The workshop will take place at the FTC’s new satellite conference center, Constitution Center, 400 Seventh Street, S.W., Washington, D.C. 20024. A workshop agenda and list of speakers will be published in advance of the workshop.

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