TrackStreet

10 REASONS WHY

YOUR MINIMUM PRICE PROGRAM COULD BE UPSETTING YOUR RESELLERS

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Abstract

To combat resale price erosion and protect brand value, your company may have implemented some form of minimum price program at the reseller level—most likely built around a Minimum Advertised Price (MAP) policy or a Minimum Resale Price (MRP) policy. (If you haven't yet implemented such a program, you may wish to start investigating your options, as it is likely that if your company hasn't already experienced problems in this area, it will.)

Establishing a policy and enforcement system to address reseller pricing can provide enormous strategic advantages for a manufacturer or other supplier or brand owner. (This paper will use "manufacturer" to mean any of them.) It can help preserve margins for key reseller partners, strengthen reseller relationships, prevent channel conflict and ultimately safeguard a brand's value in the marketplace against the detrimental effects of resale price erosion.

Based on experience with many companies across a myriad of industries to develop and enforce successful MAP and MRP policies, the fact that today more manufacturers understand the importance of systematically protecting their brand image and resale price points is certainly a positive development, particularly as most brands are under siege by online discounting. But there is much more to be done.

Among other things, there is clearly still a great deal of confusion about what these price programs should entail, what manufacturers can and cannot do from a legal standpoint and even how to determine which type of price policy to implement in the first place.

This paper will address 10 of the most common price program missteps manufacturers make. It is important to know these common pitfalls, because they can undermine your all-important relationships with your resale channels.

1 Selecting the Wrong Policy for Your Company

Often the problem with a manufacturer's price program traces back to the very beginning—choosing the wrong policy, instead of one that is geared to the specific circumstances of its business. Let's start by clarifying the terminology, so you can better understand the differences between the policy types.

Although the term "MAP" is often incorrectly used as a catchall to mean all types of price programs, a Minimum Advertised Price ("MAP") policy is one in which the manufacturer sets a minimum price only for the offers made by resellers—generally meaning the price information appearing in advertisements and promotions. MAP policies never cover the actual selling prices, as resellers are free to sell at whatever price they choose.

In the online context, a MAP policy can apply to the price appearing on the product page or in the cart, but never the checkout or actual selling price. For brick-and-mortar resellers, such a policy can cover anything outside the store (like direct mail or newspaper advertising), but nothing in the store (such as flyers handed out at the door, displays or price tags).

In contrast, a Minimum Resale (or Retail) Price ("MRP") policy is far broader, allowing the manufacturer to set minimum prices for its products applicable to all offers, as well as the actual selling price. This means that each online step through and including checkout is subject to the policy, while, at the brick-and-mortar level, everything both outside and inside the store is covered.

If a manufacturer is only concerned with online prices, it may adopt an Internet Minimum Advertised Price (IMAP), Electronic Minimum Advertised Price (EMAP) or an Electronic Minimum Resale Price (EMRP) policy.

Typically, a manufacturer will opt for a MAP policy or an IMAP or EMAP variant—covering advertised prices only—when the company's main concern is establishing a more-or-less uniform reference price for its products to avoid undermining its brand value and upsetting key reseller partners.

Key Takeaway

If your company's primary concern is what prices for your products will show up during a consumer's Internet price shopping or in such things as direct mail or newspaper ads, and it doesn't care about the selling price, then a MAP policy or a variation may be sufficient. Alternatively, if your company wants to cover all offers and the actual price charged to reseller customers, you will probably want to implement an MRP or EMRP policy.

2 Drafting Your Price Program as an Agreement

(or inadvertently turning it into an agreement after the fact)

A manufacturer may structure its price program either as (a) a one-way statement (usually referred to as a "unilateral policy") or (b) a two-way contract signed or otherwise agreed to by both the manufacturer and its reseller partners.

MAP agreements in the US have long been subject to a manufacturer-friendly legal standard known as the "rule of reason," where the practice under review is assumed to be lawful, unless it can be shown to be unreasonably anticompetitive after weighing its procompetitive benefits and justifications with its anticompetitive effects. In striking this balance, the Supreme Court has put its thumb on the scale, stating that the primary concern of US antitrust law is interbrand competition (i.e., one manufacturer's brand against that of another). If the conduct under question promotes interbrand competition, a manufacturer may restrict intrabrand competition (i.e., competition between two resellers of the same brand). While a price policy clearly restricts intrabrand competition, application of the rule of reason means that there is usually relatively little antitrust risk, as rule of reason cases are typically difficult to win for the government and private plaintiffs.

Minimum resale price agreements are also subject to the rule of reason at the federal level and almost all states since the US Supreme Court changed the law in 2007. However, five jurisdictions—California, New York, Illinois, Michigan and Maryland—have taken the position that such agreements are still illegal on their face under their own laws. Of these, the greatest practical risk of successful challenge comes from cases brought in California (because of previous enforcement actions) and Maryland (due to a statutory prohibition on minimum resale price agreements).

However, all US jurisdictions (federal and state) consider unilateral price policies to be lawful, building on a 1919 Supreme Court case known as "Colgate." In fact, such policies are sometimes referred to as "Colgate policies" are not subject to either the rule of reason or the tougher scrutiny under the law of certain states. As a result, the only choice for an MRP program is a unilateral policy. However, there are substantial business advantages to using policies, rather than agreements for MAP too.

From a business perspective, the problem with agreements (whether MAP or MRP) is the manufacturer must first get all of its resellers to agree on the terms. Then, unless the agreement states differently, each change (such as to add or delete the products subject to the agreement or change wording in the agreement) requires approval from everyone. This process is time-consuming for both your company and resellers, likely frustrating them and undermining your relationship if it happens too frequently. It also gives each reseller veto power if it doesn't like the change.

Even when companies adopt unilateral price policies, they sometimes inadvertently cause the loss of that status. For example, a contract with resellers that requires them to follow all company policies converts a MAP or MRP policy into an agreement. Since policies should never be negotiated, another way to create an agreement is to negotiate the terms of the policy or its enforcement with resellers. A third potential problem is failing to enforce a price policy uniformly, as, apart from the trade relations issues, disparate enforcement can imply that an agreement was reached on resale price with the resellers being given more lenient treatment.

Key Takeaway #1

For both legal and business reasons, the smart approach for either your MAP or MRP program will be to structure it as a unilateral policy. Since a policy is a statement, rather than an agreement, it can be changed by the manufacturer as much and as often as it pleases without ever having to obtain reseller approval. At the same time, the policy approach in the US provides a lower risk of successful antitrust challenge, as there is and can be no resale price agreement that is subject to examination under the rule of reason or, worse, harsher state law.

Key Takeaway #2

Even with the best intentions, a unilateral price policy can morph into an agreement by subjecting it to mandatory compliance by contract, negotiating any aspect of the policy or failing to enforce it in a uniform fashion. So, company personnel need to instructed on how to avoid behavior that creates an agreement, including the best ways to deal with requests and complaints from resellers.

3 Putting Enforcement Responsibility on Your Distributors or Wholesalers

While it is possible to have MAP and MRP policies that apply at the distributor or wholesale level (we'll use the term "distributor" for convenience), they are most commonly used at the ultimate reseller level, i.e., applicable to those that sell to end users. If you have distributors that also have their own dealer or retail operations (the terms “dealer” or “reseller” will be used here), in that they sell both for resale and to end users, a MAP or MRP policy would apply to distributors when they wear their dealer hat.

Sometimes manufacturers expect distributors to assume responsibility for enforcement of the manufacturer’s MAP or MRP policies or require them to adopt their own MAP or MRP policies applicable to dealers. In either case, this approach can establish an agreement on resale price. But, perhaps even more important from a business perspective, shouldn’t the manufacturer control its own policy?

Key Takeaway

Price policies can apply at the distributor level, the dealer level or both. As a manufacturer, you cannot expect your distributors to monitor and enforce your price policy. The policy belongs to the manufacturer, and it must bear sole responsibility for enforcement. However, distributors can be required to help support a dealer-level policy by doing such things as (a) passing on communications from the manufacturer to dealers, (b) selling only to authorized dealers, (c) not selling to anyone on the manufacturer’s Do-Not-Sell List and (d) providing sales information (often referred to as “point-of-sale (POS) data”) to the manufacturer.

4 Relying on Verbal-Only Policies

Some manufacturers make the mistake of simply telling resellers that they have adopted a MAP or MRP policy, but don’t put it in writing. Perhaps the thought is that putting the policy in writing requires the manufacturer to commit to specifics, and it would rather keep things fluid. However, oral price policies are problematic for several reasons.

First, the manufacturer will have no way of proving such a policy exists if the company can’t point to any documentation showing that it does. Potentially more troublesome, is there really a policy or an oral agreement on price?

Second, the goal of every price policy is voluntary compliance, rather than enforcement. But without a clear description of what exactly is expected, how can a reseller know whether it is following the policy?

Third, because a reseller might have to check in periodically with the supplier with questions regarding a verbal-only price policy, the policy’s terms are likely to be squishy, changing over time, as well as with different resellers. This can all lead to legal problems because it is more likely that the policy is really an agreement based on frequent interaction and the increased chances of negotiation that go with it. Also, it is likely that terms that vary based on the way the policy is described will mean different enforcement.

Key Takeaway

Put your price policy in writing to protect your company and encourage compliance.

5 Ignoring in-the-cart Pricing for Online Resellers

Many manufacturers mistakenly believe that their MAP policies cannot apply to the in-the-cart price, because they incorrectly view it as the sale price, rather than an advertised price. But there is empirical evidence that most end user are still shopping when they place something in the cart. Indeed, when the shopper places something in his or her cart, there is no obligation to buy. According to a Baymard Institute study in 2015, nearly 70% of all online shopping carts are abandoned without a purchase.

Even better, a New York federal court (the only court that ever addressed the issue) stated that a MAP policy could reach into the cart, as long as the prospective purchaser had a way to determine the buy price, short of actually making the purchase. The court specifically mentioned using the telephone or email to receive the actual price.

Arguably, the same logic could apply to the checkout price, at least until the purchaser is committed by okaying the transaction, as there undoubtedly some cart abandonment here prior to the commitment point. However, it is more difficult to draw the line at checkout, so MAP policies typically stop just short of it.

Key Takeaway

Although your MAP policy does not need to extend to the shopping cart, if you would like to cover the prices in the cart, you are legally free to do so in your policy, as long as a means is available for the prospective buyer to determine the price, other than by purchase.

6 Believing that MAP & MRP Policies Cannot Legally Be Enforced in Canada

From time to time, resellers in Canada push back on MAP and MRP policies, claiming that they are illegal under Canadian law. This was true until 2009, when the Competition Act was amended to adopt a standard that is similar to the rule of reason in the US. (See Question 2 and its response above.) Since then and through the date of this paper, there have been no cases in Canada challenging the sort of price programs discussed here.

By the way, the agreement/policy distinction for price programs is unnecessary in Canada, as both agreements and policies are subject to the same treatment. However, policies are still preferable on business grounds and for uniformity in dealing with resellers in both the US and Canada. Indeed, exactly the same policy can be used, typically with different price points to reflect currency differences.

Key Takeaway

Do not overlook the need to monitor and enforce a price policy with your reseller partners that sell in Canada, regardless whether based in Canada or the US. If drafted and executed properly, these policies can be perfectly legal on both sides of the border.

7 Adopting a Policy That Signals a Lack of Resolve About Enforcement

Often a manufacturer adopts a MAP or MRP policy that fails to communicate clearly the policy specifics or a willingness to stand behind the consequences described for violations. Sometimes this is due to concern that if the policy comes across as too strict or sternly worded, it could turn off resellers. Other times, the company wishes to avoid commitment by being vague.

But a wishy-washy or superficial policy can be far worse by inviting bad behavior from some resellers because they will read an ambiguous policy to favor their own behavior and don't believe the manufacturer will actually go through enforcing the consequences of violations. Plus, such a policy can turn off some of the company's most important and reputable resellers, which plan to adhere to the policy, but fear that they will be unfairly undersold by various competitors that won't comply.

With this in mind, here are a few examples of the common ways a reseller policy can communicate lack of seriousness—all of which should be avoided:

"May" vs. "Will"

Using "may" in describing either the policy's coverage or violation consequences signals the manufacturer is not prepared to enforce the policy, and it gives license to resellers not to take it seriously. Just as bad as "may" is "reserves the right." The better approach is to use "will" to indicate that the manufacturer means what it says.

Lack of Sting

Like using "may" instead of "will," coming up with enforcement consequences without serious bite can have the counterproductive effect of tempting resellers to violate the policy because the penalties are minimal, even if they are enforced.

Too Many Strikes

A reseller needs to see real consequences, from its very first violation, as well as a clear point at which repeated offenses will be get it kicked out of your network altogether. Having a policy with too many "strikes" for violations is another way of signaling weakness and a willingness to keep working even with a serial offender indefinitely.

Restarting The Clock

If a reseller knows your company will reset their violation scorecard back to zero periodically (such as each year), you are giving it a free pass to regularly violate your policy—which will be particularly tempting during big selling seasons, such as the holidays. Better not to describe a reset in your policy, but, if you wish to provide amnesty at some point across the board or reinstate a particular reseller that has been cutoff, just do it without an announcement in advance. (There is no obligation to reinstate all fallen resellers, as a manufacturer can determine those with which it wishes to do so.)

Key Takeaway

For your reseller price policy to be effective, and for it to have any credibility with your resellers, it must be clear and strong both in its rules and the consequences of violating those rules.

8 Showing Ambivalence In Policy Monitoring and Enforcement

Sometimes a manufacturer will publish a reseller price policy—even one that steers clear of the wishy-washy language described earlier—but then avoid monitoring reseller behavior or addressing violations.

This result can be due to concern that calling out a policy violator could damage the manufacturer's relationship with that reseller. Or it can simply be because the manufacturer doesn't believe it has the time or other resources to devote to enforcing its policy. Both of these represent flawed thinking and virtually assure that the policy will fail.

As for worrying that enforcing your MAP or MRP policy could harm your relationship with that reseller, consider what not addressing the violation could do. Instead of possibly creating some short-term friction (for a completely legitimate reason) with a reseller that just violated your policy, you might create much longer-term credibility damage with all of the resellers who haven't violated your policy. Another problem is the domino effect, i.e., when a reseller's low prices violate the policy and other, more substantial resellers automatically price match, multiplying the effect.

As for the issue of time and resource constraints for policy monitoring and enforcement, consider that there are automated solutions—such as TrackStreet—that will assist with much of the work for your company and provide value in doing so.

Key Takeaway

There is really no excuse for failing to implement a program for comprehensive monitoring of the products subject to your policy and aggressively and consistently dealing with violations.

9 Developing a Policy That's Too Rigid

Some manufacturers adopt reseller price policies that have so little flexibility that they create enforcement problems of their own.

If the violation consequences in your policy are extreme from the outset, there will be more reluctance to enforce such a policy over one where the severity of the consequences ramps up with additional violations. Similarly, if your policy doesn't allow any room for the ability to temporarily relax the rules for things like seasonal promotions or even for a genuine mistake by a reseller, your company likely will tread lightly in enforcement. In fact, if it does enforce such a rigid policy, your company could be missing out on revenue and important opportunities for partnership-building because they violate the rules.

Key Takeaway

While you don't want your policy to come across as too weak or superficial, you do want it to have at least some flexibility to allow for exceptions when the circumstances (and common sense) call for them.

10 Failing to Build a Broad Brand Protection Program Around the Policy

Many manufacturers make a mistake that probably is the most common when looking to set up a reseller price program. The company views its MAP or MRP policy in isolation, instead of as part of a comprehensive brand protection effort. In fact, often what looks like a resale price issue is really due to distribution problems, as manufacturers that sell to anyone and everyone shouldn't be surprised when their products are resold in undesirable places or by resellers they never heard of or over which they have no control.

Here are just a few of many examples of complementary strategies to help you protect your brand and reduce resale price erosion:

Creating an "Authorized Dealer Network"

This gives you more control over (and more visibility into) which resellers are able to buy your products and resell them. Such a program can help you limit rogue resellers and pricing policy violations.

Cutting Off Certain Resellers

Another strategy worth considering is to simply stop doing business with those resellers that are not operating in a manner that is supportive of your brand.

Varying Reseller Buy Prices

You can also help protect the margins of key resellers by creating multiple categories of resellers based on the services they perform. For example, if your company values the in-store product displays and trained sales people of brick-and-mortar resellers, you can offer them rebates or credits, which will allow them some room to sell at prices that compete with your online-only resellers and still provide sufficient margin for these higher-cost activities.

As you can see, there are many ways to design and implement a reseller price program incorrectly or at least less than optimally. But when it comes to such mission-critical assets as your brand value and relationships with your most important resellers, investing the time to roll out such a program the right way will repay your company large dividends over time.

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About TrackStreet:

TrackStreet is a leading provider of SaaS-based brand protection technologies used by more than 100 brands to protect brand value, enforce distribution policies, and increase channel sales. Used across a variety of marketplaces, TrackStreet technology monitors the Internet to provide its customers with actionable, quantifiable, trackable, historical, and real-time data that directly impacts their reputation and profitability. TrackStreet is backed by Okapi Capital, Stage Venture Partners, SaaS Venture Capital and several eCommerce-related angel investors.