

# **MINIMUM ADVERTISED PRICE**

PREPARED FOR  
AAHOMECARE'S  
RETAIL WORK  
GROUP

## **RETAIL WORK GROUP**

AAHomecare recognizes that billing Medicare on an assignment basis has become very challenging for many DME suppliers. AAHomecare also understands that many DME suppliers see an opportunity in implementing an innovative retail business in which customers pay cash. For these reasons, AAHomecare has formed a Retail Work Group comprised of stakeholders in the DME industry. The Retail Work Group is developing tools for suppliers to utilize as they move into the retail market. These tools include educational “white papers” such as this paper entitled “Minimum Advertised Price.”

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## MINIMUM ADVERTISED PRICE

By: Jeffrey S. Baird, Esq.

When a manufacturer publishes a Minimum Advertised Price (“MAP”) policy for a product, then the manufacturer is limiting the ability of the DME supplier to *advertise* the price of the product below a certain level. However, the publication of the MAP policy does not prohibit the supplier from *selling* the product below the MAP. A question that often arises is: “Why would a manufacturer want to publish a MAP?” There are five answers to this question:

- The manufacturer desires to preserve the “value of the brand.” If retailers advertise low prices, then the product may lose credibility in the eyes of the purchasing public. Said another way, the product may become a “commodity.”
- The manufacturer desires that its products be a profitable channel for the supplier. If suppliers advertise low prices for the products and, as a result, sell the products for low prices, then the manufacturer’s products will not be profitable for the supplier.
- The manufacturer does not want the supplier to drop the manufacturer’s products from its inventory. If the products are advertised at a low price...resulting in the products being sold at a low price...then the products may become so unprofitable that the supplier ceases to stock them.
- By maintaining a higher price for products, there should be enough of a “spread” for the supplier to be able to offer value-added services to its customers.
- By imposing a MAP policy, and assuming that the suppliers adhere to the MAP policy, then the playing field between “brick and mortar” suppliers and online suppliers will be leveled. Online suppliers do not have the expenses that brick and mortar suppliers have. As such, online suppliers can advertise products (that brick and mortar suppliers also sell) at lower prices. A MAP policy is designed to prevent this from happening.

For obvious reasons, a supplier...and, particularly, a brick and mortar supplier...will push a manufacturer to publish a MAP policy. The brick and mortar supplier will want to eliminate “showrooming” in which the customer examines a product on the brick and mortar supplier’s retail floor...but then purchases the same product online because the online supplier is advertising the product at a lower price.

When a supplier fails to adhere to a MAP policy, the manufacturer can give multiple warnings to the supplier. If the supplier fails to comply with the warnings, then the manufacturer can terminate its relationship with the supplier. It is not uncommon for the manufacturer to couple the MAP policy with cooperative advertising dollars that the supplier can use to promote the products subject to the MAP policy. As an incentive for the supplier to follow the MAP policy, the manufacturer can make it clear that if the supplier fails to follow the MAP policy, then the cooperative advertising dollars will be cut off.

- Note that a MAP policy is not the type of policy that a manufacturer should encourage/require a supplier to adopt. The policy should not be the subject of negotiation, nor placed in an agreement. Rather, the MAP policy should be a unilaterally developed and uniformly applied policy developed only by the manufacturer.
- Notwithstanding the existence of a MAP policy, it may be appropriate for the supplier to communicate something like “click here to read about special offers” or “add to cart to see price.”

A common question is whether the publication of MAP policies violates federal antitrust laws. The short answer is that MAP policies do not, by themselves, “per se” violate federal antitrust laws. A 2007 U.S. Supreme Court case (*Leegin*) overturned 96 years of case law pertaining to pricing structures. The Court ruled that lawsuits and FTC enforcement actions, alleging violation of federal antitrust laws, must be examined on a case-by-case basis to determine if a MAP policy (i) stifles competition or (ii) places an undue burden on consumers. There are relatively few court decisions that address MAP policies and antitrust...and such decisions have not been clear nor uniform. When addressing antitrust issues, it is helpful to compare MAP pricing to two other arrangements:

- **Resale Price Maintenance (“RPM”)** – This type of agreement is an agreement between the manufacturer and the supplier that the supplier will not sell the product for less than a set price. RPM used to be a federal antitrust violation. However, in light of *Leegin*, RPM is no longer a “per se” antitrust violation. As with a MAP policy, RPM must be examined on a case-by-case basis to determine if it (i) stifles competition or (ii) places an undue burden on consumers. Notwithstanding *Leegin*, some states may consider RPM to violate state antitrust law.
- **Colgate Policy** – This is named after a 1919 U.S. Supreme Court decision that held that it is not a federal antitrust violation for a manufacturer to unilaterally announce in advance the price for which a product can be resold...and then refuse to deal with distributors/retailers that violate the policy.

A MAP policy that *does* create a federal antitrust problem is usually one that is paired with risky behavior (e.g., the manufacturer communicates its MAP policy with competitors...and the competitors adopt the same policy).

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