

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright

)	
In the Matter of)	
)	Docket No. 9278
Toys “R” Us Inc.,)	
a corporation.)	
)	

ORDER REOPENING AND MODIFYING ORDER

On January 3, 2014, Toys “R” Us, Inc. (“TRU”) filed a petition pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission’s Rules of Practice, 16 C.F.R. § 2.51, asking the Commission to reopen and modify the consent order in Docket No. 9278 (“Order”) issued by the Commission on October 13, 1998.

The Order requires TRU to refrain from certain actions in connection with its suppliers. The Order also requires TRU to maintain records of all its communications with its suppliers. In its petition, TRU requests that the Commission eliminate Paragraphs II.A., II.B., and II.C. of the Order, and modify Paragraph IV.B. of the Order.

TRU bases its petition on changed conditions of fact that it claims are sufficient to warrant reopening and modifying the Order. TRU asserts that it has lost significant market share in the toy markets that were the subject of the Commission’s action, and that other large retailers have overtaken TRU in sales rankings. According to TRU, the reasons for the Order provisions that TRU asks be modified have ended. For similar reasons, TRU also claims that the proposed modification would be in the public interest. For the reasons stated below, the Commission has determined to grant the petition.

Background

On May 22, 1996, the Commission issued its Complaint alleging that TRU entered into a series of agreements with major toy manufacturers to prevent the toy manufacturers from selling to club stores the same products they sold to TRU. The Complaint also alleged that TRU facilitated agreements among the toy manufacturers to the same end. On October 13, 1998, the Commission issued its Opinion and Final Order, finding that TRU had violated Section 1 of the Sherman Act as alleged in the Complaint. The Commission found that TRU’s facilitation of a

horizontal agreement among the toy manufacturers violated the Sherman Act both on a per se and a rule of reason analysis. The Commission found that the vertical agreements between TRU and its suppliers violated the Sherman Act on a rule of reason analysis. The Commission found that TRU possessed market power as a purchaser and seller of toys. TRU appealed, and the Court of Appeals for the Seventh Circuit affirmed the Commission's decision on August 1, 2000.

Paragraph II.A. of the Order requires TRU to cease and desist from "continuing, maintaining, entering into, and attempting to enter into any agreement or understanding with any supplier to limit supply or to refuse to sell toys and related products to any toy discounter."

Paragraph II.B. of the Order requires TRU to cease and desist from "urging, inducing, coercing, or pressuring, or attempting to urge, induce, coerce, or pressure, any supplier to limit supply or to refuse to sell toys and related products to any toy discounter."

Paragraph II.C. of the Order requires TRU to cease and desist from "requiring, soliciting, requesting or encouraging any supplier to furnish information to respondent relating to any supplier's sales or actual or intended shipments to any toy discounter."

Paragraph IV.B. of the Order requires TRU to "maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with suppliers of respondent relating to any aspect of actual or potential purchase or distribution of toys and related products, and records pertaining to any action taken in connection with any activity covered by paragraphs II and III of this order."

Standard to Reopen and Modify

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.¹ A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes either eliminate the need for the order or make continued application of it inequitable or harmful to competition.²

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show

¹ See *Supplementary Information, Amendment to 16 CFR 2.51(b)*, ("Amendment"), 65 Fed. Reg. 50636, August 21, 2000.

² S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter"). See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992).

how the public interest warrants the requested modification.³ In the case of “public interest” requests, FTC Rule of Practice 2.51(b) requires an initial “satisfactory showing” of how the modification would serve the public interest before the Commission determines whether to reopen an order.

A “satisfactory showing” requires, with respect to public interest requests, that the petitioner make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a “satisfactory showing” if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.⁴ This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,⁵ and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner’s burden is not a light one in view of the public interest in repose and the finality of Commission orders.⁶ All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.⁷

³ Hart Letter at 5; 16 C.F.R. § 2.51.

⁴ 16 C.F.R. § 2.51.

⁵ See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

⁶ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

⁷ 16 C.F.R. § 2.51(b).

Changes of Fact Warrant Reopening and Modifying the Order

The Commission has determined that (i) changes of fact require that the Order be reopened and (ii) the Order should be modified to eliminate Paragraphs II.A., II.B., and II.C., and alter Paragraph IV.B.⁸ Paragraphs II.A., II.B., and II.C. of the Order regulate TRU's vertical relationships with its suppliers. These provisions address the violation found as to the vertical agreements TRU entered into to prevent its suppliers from selling toys to club stores, and contained broad fencing-in relief. This violation was based on a rule of reason analysis that found that TRU had market power as a buyer and distributor of toys. TRU has demonstrated that it no longer has market power as a buyer of toys. Walmart and Target have overtaken TRU in competitive strength and market share. TRU has submitted data showing that TRU's loss of competitive position is consistent across product categories. TRU has lost ground to Walmart and Target across the competitive landscape. In 2013, Walmart was the market leader, with TRU and Target sparring for second place. In addition, Target operates twice as many locations as TRU, while Walmart has four times as many. In addition to Walmart and Target, TRU has shown that it now faces significant competition from online firms. Online sales, as a proportion of total toy sales, have almost tripled between 2002 and 2012. At the time of the Order, the Commission found that TRU bought 30% or more of the large, traditional toy companies' total output. TRU has shown that it is no longer the largest customer of the major toy companies and that toy companies can and do distribute toys successfully without using TRU. TRU has shown that Walmart and Target have replaced TRU as the most important customer for Hasbro and Mattel, the two largest toy manufacturers.

The changes in market conditions also justify altering the record keeping requirements of Paragraph IV.B. Because TRU no longer has market power, which justifies eliminating Paragraphs II.A., II.B., and II.C. of the Order, it is no longer necessary that TRU maintain all its communications with its suppliers relating to any aspect of actual or potential purchase or distribution of toys and related products, as required by Paragraph IV.B. The only remaining prohibition in the Order is Paragraph II.D, which prohibits TRU from facilitating agreements between or among suppliers to limit the sale of toys and related products to a retailer.⁹ Accordingly, Paragraph IV.B. should be modified to capture the communications prohibited by Paragraph II.D. TRU has shown that any attempt to facilitate agreements among suppliers, which are prohibited by Paragraph II.D. of the Order, would have to involve the officers of its merchandizing organization, and therefore retaining records only from those persons would meet the Commission's needs.

⁸ TRU has asserted both changed conditions of fact and public interest grounds in support of its petition. Because the Commission has determined that TRU has demonstrated changed conditions of fact support the modification, the Commission need not consider whether the public interest also justifies the modifications to the Order.

⁹ Paragraph II.E. has expired by its own terms.

Conclusion

For the reasons explained above, the Commission has determined to reopen and modify the Order.

Accordingly, **IT IS ORDERED** that this matter be, and it hereby is, reopened;

IT IS FURTHER ORDERED that Paragraphs II.A., II.B., and II.C. are eliminated; and

IT IS FURTHER ORDERED that Paragraph IV.B. of the Order be revised to read:

Maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with suppliers of respondent by the officers of respondent within its merchandizing organization.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: April 11, 2014