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## **Energizer Policy for Advertisement and Marketing Funding Frequently Asked Questions for Retailers**

Effective May 1, 2006, Energizer has implemented its Energizer Policy for Advertisement and Marketing Funding ("PAMF"). Its objective is to protect and enhance the quality image and good will of Energizer's products. It is designed to help the company grow and compete in new, high technology segments by offering cooperative advertising and marketing programs that will promote and protect the Energizer® and Eveready® brands and support its accounts and retailers ("Retailers") with sufficient margin to enable them to provide optimal consumer sales support. Energizer seeks to ensure through PAMF that Energizer® and Eveready® branded products are delivered to the consumer through a high quality network of professional and knowledgeable retailers whose advertising and marketing promotions, sales environments, business practices, and customer service are commensurate with the image of the Energizer® and Eveready® brands. PAMF is also designed to discourage activities which tend to commoditize the Energizer® brand.

Following, you will find a series of commonly asked questions relating to PAMF.

1. Q. How does PAMF operate?

A. PAMF is based upon a decision of the United States Supreme Court, United States v. Colgate & Co., 250 U.S. 300 (1919) ("Colgate"), and the decision in In re Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978), cert. denied, 439 U.S. 1072 (1979). In Colgate, the Supreme Court held that it was lawful for a supplier to pre-announce the terms and conditions upon which it would continue to deal with a customer. One of the terms and conditions may be the price that the supplier will resell a given product to its customer. Another term and condition may be the price at which an account may advertise a given product purchased from the supplier, to be resold to the account's customer. These two features are both integral parts of PAMF. In In re Nissan, a cooperative advertising plan under which retailers were required to contribute to a cooperative fund and received partial reimbursement from Nissan only if their advertisements used the manufacturer's recommended retail price or no price at all, was upheld as lawful. This PAMF does not reach as far as the Nissan policy but does give Energizer the right to withhold funding for promotional advertisements and marketing from Retailers who do not follow minimum advertised prices.

2. Q. Isn't it unlawful for a supplier and a Retailer to enter into an agreement that fixes the price at which the Retailer must advertise the product to its customer?

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A. Yes it is. This is because Section 1 of the Sherman Antitrust Act of 1890 ("Sherman Act"), and its state law counterparts, condemn vertical minimum resale price maintenance ("RPM") where the prices are agreed upon by the supplier and retailers. A supplier like Energizer and a retailer would have the same Section 1 and state law liability, for agreeing on RPM.

3. Q. Well, how is this any different?

A. In PAMF, there is no agreement between Energizer, the supplier, and its Retailer. There is no contract. There is no offer for a contract or an agreement. PAMF is simply a pre-announced set of terms and conditions that are unilaterally determined by Energizer, and may or may not be followed by the Retailer, at the Retailer's discretion. However, if the Retailer does not wish to abide by Energizer's pre-announced set of terms and conditions upon which it will offer funding for promotional advertisements and marketing of Energizer® and Eveready® branded products, Energizer may determine not to offer funding to that Retailer.

4. Q. How does a "unilateral statement of Energizer's intent" differ from an agreement between Energizer and the Retailer?

A. In a unilateral statement, Energizer pre-announces, in writing, the terms and conditions upon which it will offer funding for promotional advertisements and marketing of Energizer® and Eveready® products to a Retailer. This is the essence of a lawful Colgate policy. A Colgate policy does not seek, and will not accept any statement or expression of agreement or assent by a Retailer. It is up to the Retailer whether or not it wishes to abide by the pre-announced terms and conditions. Should a Retailer offer a statement of agreement, and should it be accepted by the manufacturer, the lawful Colgate policy could be "morphed" into an unlawful RPM agreement. This is why it is important to be clear, as PAMF states:

**"This PAMF is not a contract, an offer to form a contract, or an agreement, express or implied. It is a policy statement of unilateral terms and conditions upon which Energizer may exercise its discretion. We are not asking, and will not accept, any agreement about a Retailer's compliance with this Policy. Energizer is not asking for, nor will Energizer, its employees or agents, accept any statement of agreement or acquiescence by any Retailer to this PAMF, or to any implied or stated compliance with this PAMF. This PAMF is a corporate policy of Energizer and cannot be waived, interpreted, or discussed with any Retailer by any agent, employee, or other third parties except as stated herein."**

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5. Q. It is noted in the PAMF that "Energizer is not asking for, nor will Energizer, its employees or agents accept any statement of agreement or acquiescence by any Retailer to this PAMF, or to any implied or stated compliance with this PAMF." Why are Energizer employees and sales representatives prohibited from discussing the Policy with Retailers or other third parties?
- A. Because such discussions could be misunderstood or misrepresented, or both. Discussions could supply evidence from which a judge or jury might determine that the PAMF was the product of an agreement, prohibited by the antitrust laws, and not the unilateral pre-announcement of terms and conditions, which is lawful under the Supreme Court's decision in Colgate. This is in the interest of Retailers too as a Retailer would have the same liability as Energizer for entering into an agreement that is prohibited by the antitrust laws.
6. Q. Why does PAMF state that all questions regarding this Policy shall be directed, in writing, to Energizer's Legal Department?
- A. To prevent the creation of a compromising situation that could be misinterpreted or used to misconstrue Energizer's lawful PAMF into an illegal RPM agreement. By channeling all communications concerning pricing and PAMF to Energizer's Legal Department, as a single source, such ambiguities will be eliminated. By directing questions in writing to Energizer's Legal Department, a Retailer may obtain a complete, accurate and documented response to a question without exposing itself to the risk that another person could use a discussion of PAMF as evidence of an unlawful agreement.
7. Q. What can a Retailer do if it learns that another Retailer is not advertising a product listed in Exhibit "A" to the PAMF at the current MAP price or if the Retailer believes a competing Retailer is not in compliance with the other terms and conditions of the PAMF?
- A. There is a two-part answer to this question. First, as stated in PAMF: Energizer will not "seek or accept any complaints or comments from its Retailers about the pricing or business practices of any other Retailer." Energizer's employees and sales representatives are not authorized to discuss a Retailer's pricing, advertised prices, or business practices with a competing Retailer, nor the Retailer's own pricing or advertised prices. Second, if a Retailer wishes to talk to anybody at Energizer, it must direct any questions in writing to Energizer's Legal Department, as stated above.

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8. Q. If a Retailer submits information relating to noncompliance by a competing Retailer, will Energizer provide information as to how it handled the complaint?
- A. **No.** Energizer will independently investigate any information that it receives, from any source, about noncompliance with PAMF. However, as stated above, Energizer does not seek such information, and will not engage in any discussions with Retailers providing information. Any action taken by Energizer relating to information relating to noncompliance by any Retailer will be handled solely and unilaterally by Energizer and any action will not be communicated.
9. Q. May Retailer ask Energizer's employee or sales representative questions it believes the employee or rep knows or is likely to know the answers to?
- A. **No.** The PAMF states that PAMF "is a corporate policy of Energizer, and cannot be waived, modified, interpreted or discussed with any Retailer, by any agent, employee or third party, except as stated herein." For the reasons explained above and as stated in PAMF, Energizer's employees and sales representatives are not authorized to discuss PAMF or with any Retailer or other party. Accordingly, an Energizer employee or sales representative may only refer you to the PAMF and these FAQs and instruct you to send them to ENERGIZER'S LEGAL DEPARTMENT.
10. Q. May Retailers discuss the PAMF generally with Energizer's employees or sales representatives?
- A. **No.** For the reasons explained above and as stated in PAMF, Energizer's employees and sales representatives are not authorized to discuss the PAMF with any Retailer or other party. The PAMF states that the PAMF "is a corporate policy of Energizer, and cannot be waived, modified, interpreted or discussed with any Retailer, by any agent, employee or third party, except as stated herein." Energizer understands that after reading the PAMF and these FAQs, Retailers may have questions relating to PAMF. Please submit your questions, in writing, to ENERGIZER'S LEGAL DEPARTMENT.
11. Q. How will Energizer exercise its discretion where a Retailer follows the Energizer pre-announced terms and conditions on some advertisements but not others?
- A. Energizer may unilaterally determine not to offer funding for promotional advertisements and marketing to Retailers who only comply with the PAMF on some advertisements but not others.

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12. Q. How long will the PAMF be in effect?
- A. Energizer reserves the right to change, modify, amend, or discontinue the PAMF at any time, without prior notice. There is no assurance, express or implied, to any Retailer or other person that Energizer will continue, or enforce, or not enforce this PAMF. Energizer specifically reserves the right to choose those Retailers with whom it will do business, and the right to accept or reject any purchase order, of any size, at any time, and for any reason, within its discretion.
13. Q. What will happen if a Retailer's employee or agent misapplies the PAMF as to a covered SKU?
- A. It is the responsibility of each Retailer to take appropriate steps to ensure that its employees and agents understand and apply the terms of the PAMF, if they wish to do so. This is within the discretion of a given Retailer. However, a Retailer wishing to follow the PAMF should take adequate steps to provide appropriate levels of information and training to its employees and agents. Energizer may, in its sole discretion, determine not to offer funding for promotional advertisements and marketing to Retailers who, for one reason or another, including the misapplication of the PAMF by Retailer's agents or employees, do not follow the PAMF.
14. Q. Where can a Retailer get this information?
- A. The PAMF, and the Exhibit "A" currently in force, which may be modified from time to time, will be provided to the Retailer by Energizer via United States Postal Service First Class Mail or email. The PAMF will also be posted on the Energizer website. Each Retailer is deemed responsible for checking and keeping itself, including its employees and agents, informed as to the application of the PAMF, should a Retailer wish to abide by its pre-announced terms and conditions.
15. Q. Who will determine the circumstances under which a Retailer will be considered to be in violation of the PAMF?
- A. Energizer will make this determination in the sole exercise of its discretion, based upon facts and circumstances satisfactory to it.
16. Q. Under what circumstances may a Retailer match the advertised price of a competitor who is not abiding by the terms of the PAMF?

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A. **None.** There is no "meeting competition" defense to a failure to abide by the pre-announced terms and conditions by the PAMF. Matching the advertised price of a competitor who is not complying with the terms and conditions relating to a covered product listed on a current Exhibit "A" may result in Energizer refusing to offer further advertisement and marketing funding to the Retailer, as set forth within the PAMF.

17. Q. Can a Retailer issue coupons which may be used on a covered SKU, and still meet the terms and conditions of the PAMF?

A. **Yes.** So long as the Retailer does not advertise a product listed in Exhibit "A" at a price lower than the current MAP price, the Retailer may issue a coupon which would result in the net price to the customer at a price less than the current MAP price, and still meet the terms and conditions of the PAMF. PAMF is only applicable to advertised prices, not to net prices to the customer.

18. Q. Can a Retailer offer an additional discount from MAP for purchase of an Energizer® or Eveready® covered product with the use of a proprietary credit card or other purchase instrument and still meet the terms and conditions of the PAMF?

A. **Yes.** So long as the Retailer does not advertise a product listed in Exhibit "A" to the PAMF at a price lower than the current MAP price, the Retailer may offer an additional discount from MAP for the product with the use of a proprietary credit card or other purchase instrument and still meet the terms and conditions of the PAMF. PAMF is only applicable to advertised prices, not to net prices to the customer.

19. Q. If a Retailer's normal business practice is to present prices with a specific fractional price (such as \$xxx.88 or \$xxx.99) is it allowed to modify the Energizer MAP price to reflect that practice?

A. Energizer has set the MAP prices to end in a \$X.95 price, which accommodates Retailers who price between \$.95 and \$.99. Advertisements and promotions displaying advertised prices that are lower than the current MAP price, however, will not meet the terms and conditions of the PAMF and will be considered not in compliance therewith. In such event, Energizer may exercise its discretion not to offer funding for promotional advertisements and marketing of Energizer® and Eveready® branded products to the Retailer.

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20. Q. Will Energizer offer funding for promotional advertisements and marketing to a Retailer which offers or advertises Energizer products with "Buy One, Get One Free" (BOGO's), "Half Price" or "50% Off" promotions? Is any such term and condition of the PAMF limited to products listed in Exhibit "A" or does it apply to all Energizer products?

A. **No.** Unless specifically authorized in writing by Energizer as a part of an authorized corporate promotion, "Buy One, Get One Free" (BOGO's), "Half Price" or "50% Off" advertisements, promotions and offers will not meet the terms and conditions of the PAMF and will be considered not in compliance therewith. In such event, Energizer may exercise its discretion not to offer funding for promotional advertisements and marketing of Energizer® and Eveready® branded products to the Retailer. This applies only to those Energizer products listed in Exhibit "A".

21. Q. Can a Retailer offer "added value" promotions which "bundles" Energizer® or Eveready® or other brands of products at a reduced or discounted price with an Energizer® or Eveready® covered product and still comply with the terms and conditions of the PAMF?

A. While Energizer believes the best results will come from promotions where items are within the same price range, retailers may bundle items from multiple price groups in a single promotion and still comply with the terms and conditions of PAMF if all other requirements are met (e.g. any advertised price of a MAP covered product is above MAP, etc). Any promotion that results in a MAP-covered product advertised at a price below the current MAP will not meet the terms and conditions of the PAMF and will be considered not in compliance therewith. In such event, Energizer may exercise its discretion not to offer the Retailer funding for promotional advertisements and marketing of Energizer® and Eveready® branded products.

22. Q. Can a Retailer still advertise Energizer products at the prices it chooses, in light of the PAMF?

A. **Yes.** At all times, the Retailer reserves the sole right to determine the selling prices of covered product, including in-store and point of purchase signage and materials. Nothing in the PAMF prohibits a Retailer from running advertisements of its choosing, including advertised price, at its own expense. However, advertisements will not meet the terms and conditions of the PAMF and will be considered not in compliance therewith if the advertised price is below the current MAP price. In such event, Energizer may exercise its discretion not to offer funding for promotional advertisements and marketing of Energizer® and Eveready® branded products.

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23. Q. Can a Retailer advertising or offering Energizer covered products on the Internet offer "special" prices or discounts via "bounce back quotes", special coupon codes, members only discounts, etc., and remain in compliance with Energizer's PAMF?
- A. **No.** Any such action or mechanism, which would result in the advertised price less than the current MAP price, will not meet the terms and conditions of the PAMF and will be considered not in compliance therewith. In such event, Energizer may exercise its discretion not to offer further promotional and marketing funding to the Retailer.
24. Q. Can a Retailer advertise or otherwise present Energizer covered products without a stated price?
- A. **Yes.** The inclusion of a price is not required as a condition of compliance with the PAMF.
25. Q. In lieu of a stated price for Energizer covered products, can a Retailer include a statement such as "Call for Price", "Lowest Price Anywhere", "We Will Not Be Undersold", or other statement referring to the items price or retailers pricing practices?
- A. **No.** Any such statement associated with any specific Energizer covered product, as well as any such general statement in the body or general text of any advertising, catalog, webpage, or other form of product presentation, offer or solicitation by the Retailer will not meet the terms and conditions of the PAMF and will be considered not in compliance therewith. In such event, Energizer may exercise its discretion not to offer funding for promotional advertisements and marketing of Energizer® and Eveready® branded products.
26. Q. Can a Retailer utilize eBay or other Internet auction sites to sell, offer to sell, or otherwise make solicitation for sales of Energizer covered products?
- A. **No.** Such activities with Energizer covered products on eBay or other auction sites, chat rooms, user groups, member forums, listservs, etc., will not meet the terms and conditions of the PAMF and will be considered not in compliance therewith. In such event, Energizer may exercise its discretion not to offer funding for promotional advertisements and marketing of Energizer® and Eveready® branded products to the Retailer.

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27. Q: *What is the definition of “advertised price” in PAMF?*

*A: Advertised price means the price communicated to consumers outside of the store. Advertised price, for the purposes of PAMF, does not include any price communicated in-store.*

28. Q: *What happens if a retailer advertises Energizer products below the MAP?*

*A: A retailer is free to advertise Energizer products at any price they choose; however, Energizer will not support (with CMA funds) an activity where retailers advertise Energizer products at prices below the current MAP prices. As a result Energizer may elect to:*

- Refuse to distribute funds or deny payment of retailer invoices related to the subject event*
- Decline to support any and all future promotional events*
- Require reimbursement of any on invoice discounts of goods purchased to support the event*
- Suspension of all product shipments until such reimbursements have been satisfied*
- Other actions as deemed appropriate by Energizer in the exercise of its sole discretion*

29. Q: *How does Energizer use the following phrase within the PAMF policy?*

*“Energizer has unilaterally determined to provide funding for marketing and advertisements only to those Retailers who, in the sole and independent judgment of Energizer, meet the following criteria: . . . Retailers that do not sell or market Energizer products by any manner or presentation that reduces, disparages, or injures Energizer or Energizer branded products.”*

*A: Energizer has a long history of sustained and relevant investment in our brands. The future of Energizer brands depend upon our continued investment in the brands and their ability to continue to be seen as a premium brands in the eyes of consumers.*

*Retailers play a key role in shaping how consumers interact with Energizer brands. While retailers have complete control over how Energizer branded products are shelved, displayed, promoted, and priced in the retail environment, Energizer will not support (with CMA funding) any activity which we feel will be harmful to our brands. This activity goes beyond pricing (which PAMF discusses in the most detail).*

*This phrase in the PAMF policy offers protection for both Energizer, and our retail partners, in the event a retailer engages in activities which Energizer deems are detrimental to our brands.*

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30. Q. What more can a Retailer do to learn about the application of the PAMF?
- A. Please put questions *in writing*, and send them to Energizer's Legal Department, Energizer Battery, 533 Maryville University Drive, St. Louis, MO 63141.
31. Q. If a Retailer or other party has a question relating to the PAMF where should that question be directed?
- A. Any and all questions relating to the PAMF should be submitting in writing to Energizer's Legal Department, Energizer Battery, 533 Maryville University Drive, St. Louis, MO 63141.