Testimony of

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Written Testimony of Marcy Syms, Chief Executive Officer of SYMS Corp
Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights
The Leegin Decision: The End of Consumer Discounts or Good Antitrust Policy?

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Chairman Kohl, Ranking Member Hatch, and Members of the Subcommittee:

I am Marcy Syms, the Chief Executive Officer of SYMS Corp (SYMS). Thank you very much for the invitation to testify before the Subcommittee on the issue of whether Congress should amend the antitrust laws to overrule the Supreme Court's recent decision in Leegin Creative Leather Products, Inc. v. PSKS, Inc. and to restore the long-standing per se rule governing retail price maintenance (RPM) agreements. That is an issue of great significance to SYMS, many other "discount" and "off-price" retailers, and consumers.

My testimony today will focus principally on SYMS' reliance on the per se rule and the practical consequences that Leegin will have for SYMS and, more generally, the clothing industry. Please be aware that I am neither a lawyer nor an economist, and I will limit the scope of my testimony accordingly.

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Before turning to SYMS' reliance on the prohibition against RPM agreements and the practical consequences that will attend Leegin, let me begin with some background on SYMS. SYMS is an "off price" retailer with 33 stores in 13 states that sells designer and brand name clothing at substantial savings to consumers. Syms was founded in 1959 by my father, Sy Syms, who today serves as the Chairman of SYMS' Board of Directors.

SYMS began by selling garments produced by a select group of manufacturers that supplied it on the condition that it sell their garments with generic labels or remove the brand labels at the time of sale. As SYMS' business began to grow and manufacturers learned to appreciate SYMS' commitment to maintaining the integrity of their brand by not advertising the labels it carried, its knowledge of the garments, and its respect for its customers, they began to loosen their control over how SYMS could sell to its "Educated Consumers." Today SYMS is able to sell brand name clothing with labels attached, as well as advertise brand names within its stores, on its website, and through customer mailings.

SYMS purchases most of its merchandise directly from the manufacturers of brand name and designer clothing. Most of the merchandise is first-quality and in-season. The availability of this merchandise is the result of over-production, cancelled orders, and other factors. Sometimes SYMS also places "up front" orders with a manufacturer. Occasionally SYMS sells irregulars or seconds (which it marks as such), but at no time does that represent more than 3% of the merchandise sold at SYMS.
SYMS works on a "mark up" system unique in retail, even among discount sellers and its "off-price" competitors. Instead of paying manufactures wholesale and selling at a lower mark-up than its retail competitors, SYMS pays below wholesale prices. An in-store SYMS announcement explains the concept to customers this way:

At SYMS we want you to know that we are not discounters. Discounters pay the same wholesale price as a regular department store, and then take a smaller markup. At SYMS we have long established relationships with over 200 of the top designer and brand name manufacturers. We pay less than the wholesale price and sell to you at less than the normal retail markup so you pay within 10% of the manufacturer's wholesale price.

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SYMS has relied for many years on the prohibition of RPM agreements mandated by the federal antitrust laws. It has invested its capital, structured its business, and built customer goodwill in reliance on that prohibition. (I commend to the Subcommittee to the section of the dissenting opinion in Leegin in which Justice Breyer makes just that point.)

Over the years SYMS has occasionally been pressured by manufacturers to stop selling particular merchandise because retail competitors that sell at higher prices (department stores in particular) have complained about SYMS' prices. But the prohibition on RPM agreements has, I believe, kept in check serious threats to SYMS' ability to sell merchandise according to the pricing approach I have described. That may well change as manufacturer-originated RPM policies become more prevalent in the clothing industry.

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Let me now briefly outline what I predict will be some of the undesirable effects that will attend manufacture-originated RPM in the retail clothing industry:

First, interference with consumer choice: The introduction of RPM policies will force discount retailers (especially large ones) to pursue strategies other than price-cutting--the provision of rebates, gifts accompanying purchases, and other special offers--in order to compete. As a result, consumers will find it difficult to judge what they are actually paying for the products they desire and the value they are receiving. SYMS's well-known sales approach--reflected in its slogan "An Educated Consumer Is Our Best Customer"--is that consumers should be able to judge exactly what value they are receiving and to make purchasing choices accordingly.

Second, facilitation of horizontal price-fixing agreements at the manufacturer level: As others will likely point out in greater detail, RPM may well facilitate (unlawful) horizontal price-fixing agreements among manufacturers, thereby reducing interbrand competition.

Third, restrictions on the sale of seasonal merchandise: The retail clothing market is characterized by a continually changing and often seasonal product mix. Consumers are accustomed to, and benefit from, deep markdowns on seasonal items. The introduction of RPM policies will lower a retailer's ability to sell end-of-season or out-of-season merchandise by discounting. A closely related problem will be the inability of retailers to sell poorly performing merchandize governed by RPM policies.

Fourth, advantaging foreign retailers: The introduction of RPM may create opportunities for foreign retailers--or large domestic retailers who set up foreign entities to distribute their products via the internet or catalogues--to secure a competitive advantage over domestic retailers. This is because foreign retailers will find it easier than their domestic counterparts to escape the legal consequences of violating RPM policies.

Fifth, increased transaction costs: Retailers will face increased costs as a result of having to ascertain and comply with RPM restrictions that may be attached to the products, especially when they purchase products (as they often do) from suppliers other than the manufacturer. Another source of transaction costs will result from the need to comply with state law: While federal law may allow RPM, state antitrust laws may forbid them. These increased transaction costs will of course disadvantage smaller retailers more so than large retailers.

Sixth, limitations on off-price retailer growth: It is already difficult for off-price discount retailers in the clothing industry to expand their businesses. The limited supply of discount branded products on the wholesale market restricts growth. RPM policies will further restrict the supply of discounted merchandise: Much of the discount merchandise sold by manufacturers consists of off-season or out-of-season merchandise. Increasing the lifecycle of an item at full retail will reduce the off-price supply.

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That concludes my prepared testimony. I would be very happy to answer any questions about my testimony or any other questions that the Subcommittee may have.