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FTC to Associations: Lack of Antitrust Compliance Can Facilitate Coordination and Violate the FTC Act

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In a recent enforcement action, the Federal Trade Commission has made clear that it expects trade associations to adopt antitrust compliance measures to prevent discussions among competitors that would facilitate coordination on prices or competition. ***Failure to adopt customary antitrust compliance measures****, coupled with discussions of pricing policies, might constitute an "unfair method of competition" in violation of the FTC Act.*

On March 4, 2009, the FTC issued a proposed complaint and accepted a consent order for public comment in *National Association of Music Merchants*, settling charges that NAMM violated the FTC Act by enabling and encouraging the exchange of information about pricing policies and strategy among its members in discussions at trade association meetings.[1]

The FTC contends that discussions of pricing policies at trade association meetings can *of itself* constitute an "unfair method of competition" in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and the consent decree requires that NAMM adopt and implement an extensive antitrust compliance program.

Trade and professional associations should take a careful look at their antitrust policies and antitrust compliance practices to ensure that they provide appropriate protection in light of the association's current activities. While they might not need to implement as extensive an antitrust compliance program as the FTC has ordered NAMM to implement, they may find it appropriate to update and bolster their antitrust compliance practices and, in particular, ensure that any meetings at which sensitive subjects are discussed are properly planned and monitored. At a minimum, they should ensure that they have an antitrust compliance policy that is regularly communicated to members, especially at meetings where market conditions are discussed.

1 The FTC's proposed complaint and consent decree are available at http://www.ftc.gov/os/caselist/0010203/index.shtm.

The FTC Alleged Improper Discussions But Not Price Fixing

NAMM is a trade association with more than 9,000 members nationwide, including most U.S. manufacturers, distributors, and dealers of musical instruments. Among other activities, NAMM offers seminars and organizes trade shows. The FTC's complaint alleges that, between 2005 and 2007, NAMM organized meetings and programs at which competing retailers of musical instruments were permitted, and even encouraged, to discuss strategies for implementing minimum advertised price ("MAP") policies,[2] the restriction of retail price competition, and the need for higher retail prices.

The FTC further alleges that, at these NAMM-sponsored events, competitors discussed "the adoption, implementation, and enforcement" of MAP policies, the "details and workings of such policies," "appropriate and optimal retail prices and margins," and "other competitively sensitive issues." Although the FTC does not allege that there was any agreement or tacit coordination among competitors, or any actual anticompetitive effect from the challenged conduct, it nonetheless found that the potential harm to consumers posed by the *discussions themselves* outweighed any potential benefits. According to the FTC, this exchange of information and opinion "had the purpose, tendency, and capacity to facilitate collusion and to restrain competition unreasonably," and "in many instances" neither served a "legitimate business purpose of NAMM or its members" nor resulted in significant pro-competitive or efficiency benefits.

The FTC alleges that NAMM directly facilitated this exchange of anti-competitive information because its representatives "determined the scope of discussion by selecting moderators and setting the agenda for these programs" and "helped steer the discussions." According to the FTC, "the exchange of information engineered by NAMM" "crossed the line that divides legitimate trade association activities from unfair methods of competition." The FTC suggests that it can be an unfair method of competition *in itself* to merely have association meetings at which members discuss "strategies for implementing minimum price policies, the restriction of retail price competition, and the need for higher retail prices," at least where the formalities of a proper antitrust compliance program have not been observed.

The Proposed Consent Order Requires NAMM to Adopt an Extensive Antitrust Compliance Program

The FTC's proposed consent order enjoins NAMM from committing future violations and requires that NAMM implement an extensive antitrust compliance program.

Specifically, NAMM is required to:

1. Appoint an antitrust compliance officer, who for the first three years following the adoption of the consent order must be an antitrust lawyer identified to the FTC;

2. Appoint and maintain antitrust counsel to implement, monitor and "actively supervise" an antitrust compliance program;

2 A MAP policy is a policy under which the manufacturer and retailer agree that the retailer would not advertise a price lower than the manufacturer's minimum price, although the retailer could sell below that price. MAP policies have never been held to be illegal per se, *In re Nissan Antitrust Litig*., 577 F.2d 910 (5th Cir. 1978), and clearly would not be illegal per se in light of the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877 (2007), that resale price maintenance is not illegal per se. However, agreements between manufacturers to adopt RPM might be challenged as a per se violation, and the FTC might take the view that agreements among manufacturers to adopt MAP policies might also be illegal. The FTC has objected when restrictive MAP policies were adopted by an entire industry, *Sony Music Entertainment, Inc.* (Docket No. C-3971, 2000), even without alleging that the manufacturers agreed with each other to adopt MAP policies.

3. Implement an annual in-person training program for NAMM's board of directors, agents, and employees concerning NAMM's obligations under the order and the antitrust laws;

4. Require review and written approval by the antitrust compliance officer prior to distribution of (i) all written materials and prepared remarks by any representative of the association or member of its board of directors "that concern or relate to" price terms, margins, profits, MAP policies, or resale price maintenance policies; and (ii) all final agendas and materials distributed at, in advance of, or after any meeting of NAMM's board of directors or executive committee;

5. Issue a written statement providing context-appropriate guidance on compliance with the antitrust laws to all product manufacturers or dealers scheduled to speak at NAMM events, and obtain written certification from each scheduled speaker that he or she has received and read the statement;

6. Implement and administer an internal reporting process for potential antitrust violations, which would permit reporting without the threat of retaliation; and internal disciplinary policies and procedures for failure to comply fully with the order;

7. Require antitrust counsel to attend all NAMM events in person for three years from the date of the order, and to be present at any meeting to which the entire board of directors or executive committee has been invited for three years from the date of the order; and

8. Require recitation of a statement providing context-appropriate guidance on antitrust compliance at the commencement of each meeting of the board of directors and executive committee, and at the commencement of each NAMM event.

In addition, NAMM is required to take measures to ensure compliance with the order, including making audio or video recordings of each panel discussion or presentation at all NAMM events. The public comment period expires April 2, 2009.

Associations Should Review and Update Their Antitrust Policies

It is settled law that mere exchange of information, without an agreement on prices or terms of sale (or other competitive factors), is not illegal per se, although it can be found to facilitate price fixing.[3] Nonetheless, the antitrust agencies have sometimes expressed concern about exchanges of information, and have (infrequently) challenged exchanges of information even without alleging an agreement on prices or terms.[4]

Although the FTC "does not contend that the exchange of information among competitors is categorically without benefit," it will consider "the type of information involved, the level of detail, the absence of procedural safeguards, and overall market conditions" when determining whether to take enforcement action. The "absence of procedural safeguards" may well have influenced the FTC's enforcement

3 *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *United States v. Citizens & Southern*, 422 U.S. 86 (1975); *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

4 In 2005 the Antitrust Division filed a civil complaint alleging that an actuarial consulting firm exchanged competitively sensitive information – specifically, information relating to the use of contractual limitations of liability in engagement agreements with pension funds and other employee benefit plans – among its members and with other actuarial consulting firms. *United States v. Professional Consultants Insurance Company, Inc.*, Civil Action No. 1:05CV01272 (D.D.C. filed June 24, 2005) (Complaint), available at http://www.usdoj.gov/atr/cases/f209700/209728.htm.

decision. The proposed consent order provides significant insight into what the FTC would regard as an adequate antitrust compliance program for a trade or professional association.

Accordingly, associations should review their antitrust policies and practices and assess whether they provide adequate protection in light of the trade association's current activities. Most trade associations likely will want to ensure that they (1) have a written antitrust policy, supported by an active internal compliance program; (2) review the substance of all association events in advance to ensure that subjects that could raise antitrust risk are not discussed; (3) monitor in an appropriate way association events, at the very least ensuring that participants are provided context-appropriate guidance on compliance with the antitrust laws; and (4) retain antitrust counsel who is available to provide the association with specific advice.

Although the NAMM case is primarily about unchecked trade association meetings, the FTC's analysis of the case discusses the risks to competition in exchanging information. "[I]t is imperative that trade association meetings not serve as a forum for rivals to disseminate or exchange competitively-sensitive information, particularly where such information is highly detailed, disaggregated, and forward-looking."[5] The U.S. antitrust agencies have advised firms seeking to exchange competitively sensitive information to make sure that the information is historic (at least three months old) and aggregated, so that specific competitive information—in particular, specific prices charged to specific customers—is not shared.[6]

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5 Analysis to Aid Public Comment at 2.

6 U.S. Dept. of Justice & Federal Trade Comm'n, "Statements of Antitrust Enforcement Policy in Health Care," statement 6, available at http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm.