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Trade Associations and Anticompetitive Conduct: Lessons From the NAMM Case

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Like for-profit entities, trade associations must also be diligent in following established procedures for collecting price-related and other competitively sensitive information from their members. A consent order from the FTC to the National Association of Music Merchants establishes major implications for trade associations and their antitrust compliance policies.

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Last April, the Federal Trade Commission executed a final consent order settling charges that the National Association of Music Merchants (NAMM) violated Section 5 of the FTC Act.[1] The charges were based on several of NAMM's business practices, including the promotion of discussions of pricing strategies, retail margins, and minimum advertised pricing policies at industry-wide meetings. The order demonstrates the FTC's continued scrutiny over the meetings of trade associations, and signals that associations such as NAMM must be diligent in following established procedures for collecting price-related and other competitively sensitive information from their members.

Through the consent order, the FTC established that it "is imperative that trade association meetings not serve as forum for rivals to disseminate or exchange competitively-sensitive information, particularly where such information is highly detailed, disaggregated, and forward-looking."[2] While the consent order does not establish new precedent, the order nonetheless has major implications for other trade associations in implementing their antitrust compliance policies and conducting association meetings and other activities.

Current Laws as Applied to Trade Associations

Courts generally apply the Rule of Reason[3] in reviewing alleged anticompetitive conduct by associations such as NAMM (other than price fixing, group boycotts, and market allocation).[4] As a result, only acts and contracts that unreasonably restrain trade will be subject to liability under the antitrust laws. It is settled law that the exchange of information, without an agreement on prices or terms of sale, is *not* a "per se" violation. The NAMM case, however, provides guidance for trade associations as to the types of information exchanges that *will* be seen as facilitating price-fixing and thus constituting antitrust violations.

Trade associations have long been monitored for facilitating the exchange of information among competitors and have been "historically been subject to antitrust scrutiny."[5] Although the Commission has stated that association meetings can productively expand the market in which its members sell and help firms to function more efficiently, two types of risks created by these meetings generally draw the attention of antitrust enforcers.[6] First, the FTC has observed that these meetings create the potential for a discussion of prices, output or strategy that can "mutate into a conspiracy to restrict competition."[7]

Second, the information exchange may "facilitate coordination among rivals that harms competition."[8] Therefore, when participants of trade associations use their membership to inflict competitive injury, courts will typically find an antitrust violation.[9] The NAMM case provides guidance as to the type of safeguards that associations can employ to avoid such liability.

The NAMM Case: Factual Background

NAMM is a trade association comprised of more than 9,000 members across the United States, including most of the manufacturers, distributors, and distributors of musical instruments and related products in the United States. Among its other activities, NAMM sponsors two trade shows each year to provide competitors with the opportunity to meet and discuss issues of concern to the industry.

Between 2005 and 2007, NAMM organized various meetings and programs at which competing retailers of musical instruments were permitted and encouraged to discuss strategies for implementing minimum advertised price policies,[10] the restriction of retail price competition, and the need for higher retail prices. NAMM administrators organized these meetings, selected moderators, and planned the agendas. NAMM members did, in fact, share information about prices and businesses strategy at these meetings, and as a result, the meetings enhanced the members' ability to coordinate price increases for their products.

Consequently, the FTC filed an antitrust claim against NAMM. The claim alleged that NAMM had arranged and encouraged the exchange among its members of competitively-sensitive information, in violation of Section 5 of the FTC Act.[11] The FTC charged that NAMM's activities exceeded the threshold of legitimate trade association activities, and instead "violated federal law … [by] engaging in conduct that had the principal tendency or likely effect of harming competition and consumers."[12]

The parties ultimately agreed to a consent order on April 8, 2009. Although NAMM clarified that the agreement does not constitute an admission of wrongdoing, the agreement does require NAMM to institute internal policies relating to association-wide communications, the conduct of meetings, and other practices.[13] The language of the order signifies the continued interest of the FTC over trade and other association meetings and suggests the procedural safeguards best undertaken by associations in NAMM's position.

The NAMM Consent Order

Under the terms of the proposed consent order, NAMM is barred from coordinating the exchange of price information among members, coordinating discussions relating to price margins, and facilitating anticompetitive agreements among members. In requiring that NAMM implement an extensive antitrust compliance program, the consent order also provides general guidelines for other associations in planning their industry and professional meetings. The NAMM consent order requires the association to:

- Appoint an antitrust compliance officer;
- Appoint and maintain counsel to implement and supervise the compliance program;
- Implement an annual training program for NAMM's directors, agents, and employees related to NAMM's obligations under the consent order and applicable laws;
- Require review and written approval by the antitrust compliance officer prior to the distribution of all material and prepared remarks by any representative or director pertaining to competitively-sensitive information;
- Issue a written statement providing context-appropriate guidance on compliance with antitrust laws to all product manufacturers and dealers scheduled to speak at NAMM events;
- Have antitrust counsel present at all association events and meetings;
- Require antitrust counsel to participate in all events in which the Board or Executive Committee of the association participate;
- Recite a statement providing antitrust compliance guidance at the beginning of every association meeting.

Impact of the NAMM Case and Best Practices for Associations

The consent order demonstrates that associations have a significant responsibility in overseeing their industry and professional meetings and other activities. The consent order was notable for its focus on the association itself and its role as the provider of the meeting forum, confirming once again that the FTC will consider more than the actions of *individual* members of trade associations when assessing antitrust compliance. Significantly, the FTC did not even allege that there was coordination among the competitors in the NAMM association; nor did it contend that there was an actual anticompetitive effect created by the NAMM trade shows.

Echoing numerous court decisions,[14] the NAMM consent order acknowledges that the structure of associations does not, in and of itself, create an inference of a conspiracy or antitrust violation. Thus, the consent order does not purport to impede the ability of NAMM and other associations to participate in legitimate trade association activity, including the sponsorship of "trade shows and other events, … the publication or dissemination of aggregated survey data, the sharing of best practices and training materials, and the communication of information related to creditworthiness, product safety, and warranty issues."[15] The FTC also stated that it "does not contend that the exchange of information among competitors is categorically without benefit."[16]

The FTC did conclude, however, that the interests of consumers require that NAMM employ numerous safeguards to lower the risk of price facilitating. Finding that this exchange of information "had the purpose, tendency, and capacity to facilitate collusion and restrain competition unreasonably," the consent order provides compliance guidelines for NAMM to ensure that future tradeshows do not present the same risk of consumer injury.

While the FTC warned against facilitating the exchange of retail prices and pricing policies, it noted that *aggregated* survey data could be readily published and disseminated. This is particularly significant because the agency, along with the U.S. Department of Justice, issued a safety zone for the permissible exchange of price and cost information in its 1996 antitrust guidelines for the health care industry.[17] To qualify for safety-zone protection, the collection of competitive information by the entity must be:

- Managed by a third party;
- Based on data more than three months old;
- Be reported by at least five participants for for each statistic disseminated;
- Sufficiently aggregated to ensure that prices charged or compensation paid by particular participant cannot be identified.[18]

This safety zone has long been thought to apply outside the health care context, which is supported by the FTC's endorsement of the publication of aggregated survey data in the consent order.

Lastly, in assessing the activities undertaken by NAMM, the FTC observed that "the potential for competitive harm from industry-wide discussions must be weighed against the prospect of legitimate efficiency benefits."[19] The agency acknowledges in its analysis of the consent order that by promoting the exchange of information among their members, associations do create opportunities for innovation and sharing of best practices, which is very much in the public interest. Associations, however, have the obligation to adopt procedural safeguards to ensure that such exchanges do not wander over to the dark side of price fixing or other anticompetitive practices.

These safeguards should include, at a minimum:

- Adopting antitrust compliance policies;
- Educating attendees about antitrust laws prior to the meetings;
- Prohibiting the discussion of price or cost-related information unless it meets the safety zone criteria discussed above;
- Arranging for the presence of antitrust counsel during discussion of competitively-sensitive topics.

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[1] 15 U.S.C. § 45.

[2] 74 Fed. Reg. 12868, 12869 (Mar. 24. 2009).

[3] Courts use the Rule of Reason when analyzing claims alleging violations of § 1 of the Sherman Act. *See* ABA Section of Antitrust Law, Antitrust and Trade Associations, 56 (1996). The Rule of Reason applies to claims brought under § 5 of the FTC Act, as courts have held that conduct that violates the Sherman Act is generally deemed to be a violation of §5 of the FTC Act as well. *See, e.g., Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941); ABA Section of Antitrust Law, Premerger Coordination: The Emerging Law of Gun Jumping and Information Exchange, 93 (2006).

[4] *Professional Engineers v. U.S.*, 435 U.S. 679, 687-92 (1978) (applying Rule of Reason to challenged ethical canon prohibiting competitive bidding by member engineers).

[5] *Broadcom Corporations v. Qualcomm,* 501 F.3d 297, 308 (3rd Cir. 2007) (holding a patent holder liable for anticompetitive conduct in a private standard setting environment).

[6] 74 Fed. Reg. at 12868.

[7] *Id.*

[8] *Id.*

[9] *See, e.g.*, *Allied Tube v. Indian Head,* 486 U.S. 492, 510 (1988).

[10] A minimum advertised price ("MAP") policy is one in which the manufacturer and retailer agree that the retailer will not advertise a price lower than the manufacturer's minimum price, even though the retailer actually can sell the product at a lower price.

[11] *California Dental Ass'n v. Federal Trade Commission*, 526 U.S. 756 (1999) (finding a Section 5 violation when association action has "the principal tendency or the likely effect of harming competition and consumers").

[12] Federal Trade Commission, *NAMM Settles FTC Charges of Illegally Restraining Competition* (March 4, 2009) .

[13] NAMM Press Release, available http://www.namm.org/news/press-releases/namm-statement-regarding-ftc-action (last visited December 13, 2009).

[14] *See, e.g., Consolidated Metal Products v. American Petroleum Institute*, 846 F.2d 284, 293-94 (5th Cir.1988) (associations are not walking conspiracies); *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652, 672 (E.D.N.C. 2003) ("mere memberships and associations in [trade associations], without more, do not create a plus factor or even an inference of conspiracy").

[15] 74 Fed. Reg. at 12869.

[16] *Id.* (citing *United States v. Gypsum Co.,* 438 U.S. 422 (1978) (explaining that the exchange of information can, in some circumstances, increase economic efficiency and make markets more rather than less competitive).

[17] Dept. of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care (1996), www.ftc.gov/reports/hlth3s.htm.

[18] *Id.*, at Statement 6.

[19] 74 Fed. Reg. at 12869.

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