

Bad Economic Conditions Raise New Concerns Over Price Fixing Claims

In December, we published a client alert observing that bad economic conditions provided a fertile ground for claims of “price signaling” rooted in public statements by senior corporate executives.¹ On March 4, 2009, the FTC announced its approval of a proposed consent order that underscores a different concern about price fixing claims during periods of price and profit declines, this time in the context of trade association meetings or trade shows.

The FTC Complaint and Proposed Consent Order

The FTC complaint and proposed consent order charges that the National Association of Music Merchants (“NAMM”) violated the antitrust laws by “enabling and encouraging the exchange of competitively sensitive price information” among its members.² Specifically, NAMM is charged with having organized meetings and programs at which competing members were “encouraged” to discuss their nonpublic strategies for implementing minimum advertised pricing strategies, restricting retail price competition, and securing higher retail pricing.³ While directed at raising wholesale prices, the arrangement may also have been thought by the FTC to have been aimed at creating a pricing umbrella at the retail level that would allow all participants in the industry to enjoy greater profits.⁴

As part of the proposed consent order, NAMM agreed to a number of remedial actions, an unusual number of which involved compliance activities. Specifically, NAMM agreed to institute an antitrust compliance program that involves direct training of the association’s Board as well as all of its employees and officers, a review by antitrust counsel of NAMM agendas, written materials, and prepared remarks, the creation of a whistleblower policy, and the audio and video recording of significant presentations at NAMM events.⁵ The proposed consent order institutionalizes many compliance activities that are standard fare at trade associations, including the attendance of antitrust counsel and the recitation of a compliance statement before the board and other meetings.

Many of the requirements of the proposed consent order are ones that well-advised trade associations have routinely undertaken. Many are not, however, and associations should consider which make sense in the context of their operations and the antitrust risks that seem to be presented. We feel it is clear, however, that the requirements of the proposed consent order should not be taken as setting a new baseline of “best practices” that associations may only ignore at their own peril.

The FTC’s analysis of the proposed order discusses in unusual detail the antitrust rules applicable to trade association conduct. Taking the position that such associations might inherently be deemed conspiracies among their members, the FTC states that concerns were raised where NAMM provided a “forum” for the exchange of competitively sensitive information, “particularly where such information is highly detailed, disaggregated, and forward-looking.”⁶ Thus, the FTC concludes, an association (and, perhaps, parties in an analogous position) violates the antitrust laws “when it engages in concerted conduct that has the principal tendency or the likely effect of harming competition or consumers.”⁷ Still, the FTC did not articulate a *per se* standard of liability but rather a balancing test, where the challenged conduct *only* violated the law because “no significant pro-competitive benefit was derived from the challenged conduct.”⁸

Lessons For Future Conduct

The importance of the NAMM order extends well beyond the trade association itself, which,

notably, was the only respondent. Clearly the NAMM members who participated in the discussions at issue were engaged in activities of the most dangerous kind from the standpoint of antitrust compliance. And potential claims against the members remains a possibility, perhaps prompted by little more than pricing changes in the marketplace. Given the availability of treble damages, class action vehicles, and the rule of joint and several liability in a conspiracy case, the potential consequences to the members as well as the trade association could be catastrophic. This is a good occasion to remind clients that every participant in trade association or trade show activities bears a substantial and direct responsibility to ensure that its own conduct steers well clear of competitively sensitive areas.

It is also notable, and especially timely, that the activities that are the subject of the FTC complaint allegedly arose in the context of industry-wide concern over increased retail price competition for musical instruments.⁹ Precisely the same concerns over declining sales and/or prices are awash across all industries in the country as a result of the extraordinarily difficult times faced by businesses worldwide. This is another reminder that antitrust compliance begins with an understanding of human nature, and that thoughtful legal advice must bear in mind the pressures that even the most honest businesspeople are currently experiencing.

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1. <http://www.hugheshubbard.com/Bad-Economic-Conditions-Raise-Concerns-Over-Antitrust-Claims-Based-on-Public-Statements-by-Senior-Executives-12-02-2008/>.
 2. Complaint ¶ 4. Copies of all documents relating to the NAMM matter referred to herein may be found at: <http://www.ftc.gov/os/caselist/0010203/index.shtm>.
 3. *Id.* ¶ 5.
 4. The allegation of an attempt to facilitate price fixing only at the retail level raises some interesting questions and possible defenses. NAMM includes members at all levels of distribution from manufacture to sale. In classical economic theory, manufacturers would be thought to encourage price competition at the retail level in order to keep retail prices low and thereby maximize sales, and would have no interest in actions that would have the opposite effect. Allegations of the type described may, however, reflect the real-world behavior of markets in specific circumstances where the market cannot so easily be explained by a simplified market model. Presumably, though, the FTC at some point would have had to allege additional agreements or facts for the feared industry-wide conspiracy to make economic sense.
 5. See Decision and Order, Section II.B.
 6. Analysis of Agreement Containing Consent Order To Aid Public Comment at 2.
 7. *Id.* at 2-3, citing *California Dental Ass'n v. Federal Trade Commission*, 526 U.S. 756 (1999).
 8. *Id.* at 4.
 9. *Id.* at 1.

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March 2009



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