

**ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT**

In the Matter of National Association of Music Merchants, Inc., File No. 001 0203

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with the National Association of Music Merchants, Inc. (“NAMMM” or “Respondent”). NAMMM is a trade association composed of more than 9000 members that include manufacturers, distributors, and dealers of musical instruments and related products. The agreement settles charges that NAMMM violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by arranging and encouraging the exchange among its members of competitively sensitive information that had the purpose, tendency, and capacity to facilitate price coordination and collusion among competitors. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this ana

II. Legal Analysis

Adam Smith famously warned of the danger of permitting competitors even to assemble in one place.¹ The Federal Trade Commission does not take nearly so jaundiced a view toward trade association activities. The Commission is aware that trade associations can serve numerous valuable and pro-competitive functions, such as expanding the market in which its members sell; educating association members, the public, and government officials; conducting market research; establishing inter-operability standards; and otherwise helping firms to function more efficiently.

At the same time, it 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. The risk is two-fold. First, a discussion of prices, output, or strategy may mutate into a conspiracy to restrict competition. Second, and even in the absence of an explicit agreement on future conduct, an information exchange may facilitate coordination among rivals that harms competition. In light of the long-recognized risk of antitrust liability, a well-counseled trade association will ensure that its activities are appropriately monitored and supervised.²

According to the Complaint, NAMM's activities crossed the line that distinguishes legitimate trade association activity from unfair methods of competition. A respondent violates

¹ "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* 55 (Great Books ed. 1952) (1776).

² See, e.g., Steven J. Fellman, *Antitrust Compliance: Trade Association Meetings and Groupings of Competitors: The Associations's Perspective*, 57 *Antitrust L. J.* 209 (1988) ("Counsel should receive agendas of all committee meetings in advance of the meetings and make sure that he or she monitors committee meetings that may involve antitrust-sensitive issues."); Kimberly L. King, *An Antitrust Primer For Trade Association Counsel*, 75 *Fla. Bar J.* 26 (2001):

Here are a few things trade association counsel, executives, and members generally should and should not do: DO encourage the trade association to help expand the markets within which its members compete; . . . DON'T let the association be used as a forum for discussion of members' price-related terms of sale, geographic areas or customers to be served, or the kinds of goods or services to be offered; DON'T let the association adopt rules governing price-related terms under which members sell goods or services; DON'T let the association be used as a conduit for anticompetitive exchanges of information, such as current pricing to particular customers or planned price increases; DON'T let the association be used to facilitate an agreement among competitors to refuse to deal with any third person . . .

³ Although the Commission does not directly enforce the Sherman Act, conduct that violates the Sherman Act is generally deemed to be a violation of Section 5 of the FTC Act as well. *that*

⁵ In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2717 (2007), the Supreme Court explained that competing retailers, by acting together to compel a manufacturer to implement or enforce a vertical distribution restraint, may harm competition:

A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement.

III. The Proposed Consent Order

NAMM has signed a consent agreement containing a proposed consent Order. The proposed Order enjoins NAMM from encouraging, advocating, coordinating, or facilitating in any manner the exchange of infor