

5 Takeaways From FTC Actions Against Professional Boards

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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, "The Wealth of Nations: An Inquiry into the Nature & Causes of the Wealth of Nations."

The U.S. Supreme Court oral arguments in the North Carolina Board of Dental Examiners v. Federal Trade Commission cast the FTC's scrutiny of competitor-controlled boards into the national spotlight. While the North Carolina Dental case has been the FTC's most high-profile recent challenge to the rules of professional boards and associations, two recent consent decrees — one with the National Association of Teachers of Singing (NATS) and another with the National Association of Residential Property Managers (NARPM) — underscore that competitor-controlled groups remain a priority for the commission.

This article provides a brief description of both investigations and provides five takeaways from the FTC's enforcement actions against competitor-controlled boards.

National Association of Teachers of Singing

NATS is a professional association consisting of over 7300 singing teachers, employed by schools, universities, music studios, and as private instructors. NATS is governed by a member-elected board, which adopts a set of bylaws and a code of ethics for the organization. Members agree to adhere to the code of ethics.

A portion of that code of ethics provides that "Members will not, either by inducements, innuendos, or other acts, proselytize students of other teachers." The FTC's investigation revealed that NATS investigated complaints of violations of this provision and contacted teachers whom it felt were noncompliant.

The FTC labeled this nonsolicitation provision — which all members were required to abide by — an anti-competitive agreement among members not to compete. In a consent decree, NATS agreed to repeal and refrain from enforcing this or similar ethical rules and to design and maintain an antitrust-



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compliance policy.[1]

National Association of Residential Property Managers

NARPM is a professional association of over 4,000 real estate agents, brokers, and managers and their employees. Generally these members engage in the management of residential and industrial properties and homeowners associations. NARPM also maintains a code of ethics, which prevents members from “solicit[ing] competitors’ clients,” or “criticizing other property managers or their business practices.” Members found by NARPM to be in violation of this provision can be reprimanded, sanctioned or expelled from the association. NARPM’s consent decree with the FTC requires it to refrain from enforcing this provision, inform its members of the change, and maintain an antitrust compliance policy.

5 Lessons From The Consent Decrees

Competitor-Controlled Organizations Are an Enforcement Priority for the FTC

These consent decrees, in addition to the resources that the FTC devoted to the investigation, trial and appeal of the North Carolina Dental matter demonstrate that the agency has heeded Adam Smith’s warnings about trade-association conduct. In each of these investigations, the neither of the FTC’s analyses to aid public comments of the consent decrees analyze in any meaningful whether there was an “agreement” among the members. Rather, the FTC takes it as a given that the associations are “walking conspiracies” of their members, such that any conduct of the organization is by definition an “agreement” among competitors that triggers antitrust concern.

No Organization Is Too Small to “Sneak Under the Radar”

There is no de minimus exception to the antitrust laws, which these actions confirm. Neither of the organizations that the FTC targeted is particularly large and neither appears to have a particularly important role in the national economy. The FTC appears eager to send a message that the rules of trade associations and other groups have an inherent ability to harm competition.

The Antitrust Laws Expect Competition to Be Cutthroat

The consent decrees do not challenge “hard core” price fixing or bid rigging. Rather, they challenge professional-association rules that essentially require their members to “play nice” with each other and refrain from stealing each other’s customers.

Adam Smith would undoubtedly agree that members of a trade association who are friendly with each other might be unlikely to poach their acquaintances’ clients. But when this understanding is reduced to writing in a policy that all members must abide by, an innocent “professional courtesy” runs the risk of crossing the line into an antitrust violation.

This expectation that competitors not agree to “poaching” or other aggressive competition was also seen recently in the series of government investigations and lawsuits regarding the agreement among tech companies not to solicit each other’s employees.[2] Thus, an organization’s human-resources department is expected to compete as aggressively as its other units.

Pro-Competitive Justifications for Coordinated Conduct Are Not Tested in Consent Decrees

Many of the targets of FTC investigations are relatively small and not well funded. When the FTC staff presents these organizations with the option of a consent decree that is limited to ceasing the challenged conduct, most organizations conclude that resisting the consent decree is not worth the expense or burden that it would entail. Thus, the only published analysis of the conduct is an analysis to aid public comment that explicitly or implicitly treats the challenged conduct as per se illegal or subject to the “inherently suspect” standard.

Because neither of these standards requires an extensive inquiry into competitive effects, pro-competitive justifications for conduct — such as preventing free riding or enhancing public safety — are not tested. When trade associations are assumed to be “walking conspiracies” and potential pro-competitive justifications for their conduct are not tested, organizations have little guidance as to where the line between permissible and impermissible conduct lies.

Antitrust Counsel Should Review Association Bylaws

Finally — and most importantly for trade associations — the troubles of NATS and NARPM could easily have been avoided with the assistance of antitrust counsel. Prohibitions on poaching competitors’ customers are easily identifiable as problematic. The antitrust laws recognize, however, that many trade-association activities are pro-competitive. Antitrust counsel can identify the line between pro-competitive and anti-competitive conduct and help develop a factual basis to demonstrate that restrictions on members’ conduct actually enhance competition.

Conclusion

The FTC’s consent decrees with two relatively small trade associations, announced in a single press release, should leave no doubt that the activity of trade associations, quasigovernmental boards and similar organizations of competitors is a major focus of the commission. Organizations should therefore learn the lessons of these actions to avoid becoming the subject of the next investigation.

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[1] Analysis to Aid Public Cmt., In the Matter of Nat'l Ass'n of Teachers of Singing, Inc, No. 131 0127 (F.T.C. Aug. 22, 2014); Analysis to Aid Public Cmt., In the Matter of Nat'l Ass'n of Residential Prop. Mgrs., No 141 0031 (F.T.C. Aug. 22, 2014).

[2] See Competitive Impact Stmt., United States v. Lucasfilm Ltd., No. 1:10-cv-220 (D.D.C. Dec. 21, 2010).