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. ("NAMM" or "Respondent"). NAMM 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 NAMM 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 analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

NAMM is a trade association. Most U.S. manufacturers, distributors, and dealers of musical instruments are members of NAMM. NAMM serves the economic interests of its members by, among other things, promoting consumer demand for musical instruments, lobbying the government, offering seminars, and organizing trade shows. In the United States, NAMM sponsors two major trade shows each year, where manufacturers introduce new products and meet with dealers. In addition, NAMM's trade shows provide competing manufacturers, distributors and retailers of musical instruments an opportunity to meet and discuss issues of concern to the industry.

An ongoing subject of concern to NAMM members in recent years has been the increased retail price competition for musical instruments, and whether that competition benefitted consumers more than it benefitted NAMM members. Between 2005 and 2007, NAMM organized various meetings and programs for its members at which competing retailers of musical instruments were permitted and encouraged to exchange information and discuss strategies for implementing minimum advertised price policies, the restriction of retail price competition, and the need for higher retail prices. Representatives of NAMM determined the scope of information exchange and discussion by selecting moderators and setting the agenda for these programs. At these NAMM-sponsored events, NAMM members discussed the adoption, implementation, and enforcement of minimum advertised price policies; the details and workings of such policies; appropriate and optimal retail price and margins; and other competitively sensitive issues.

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

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[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 . . .

Section 1 of the Sherman Act and Section 5 of the FTC Act when it engages in concerted conduct that has the principal tendency or the likely effect of harming competition and consumers. *California Dental Ass'n v. Federal Trade Commission*, 526 U.S. 756 (1999).[3] The conduct of a trade association or its authorized agents is generally treated as concerted action. *E.g.*, *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 356 (5th Cir. 2008) ("When an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members.").

The Complaint alleges that at meetings and programs sponsored by NAMM, competing retailers of musical instruments and other NAMM members discussed strategies for raising retail prices. Firms also exchanged information on competitively-sensitive subjects – prices, margins, minimum advertised price policies and their enforcement. And not only did NAMM sponsor these meetings, but its representatives set the agenda and helped steer the discussions. The antitrust concern is that this joint conduct can facilitate the implementation of collusive strategies going forward.[4] For example, such discussions could lead competing NAMM members to refuse to deal with a manufacturer, distributor, or retailer unless minimum advertised price policies, or increases in minimum advertised prices, were observed and enforced

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[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. *E.g., Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941).

[4] Concerted action that impairs competition by facilitating collusion may be challenged under Section 1 of the Sherman Act. *E.g.*, *United States v. Container Corp.*, 393 U.S. 333 (1969) (agreement to exchange price information); *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936) (agreement to exchange price information); *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489 (9th Cir. 1952) (agreement to standardize product); *United States v. Rockford Memorial Hospital Corp.*, 898 F.2d 1278 (7th Cir. 1990) (merger).

Unilateral conduct that impairs competition by facilitating collusion may be challenged under Section 5 of the FTC Act. *E.g.*, *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *In the Matter of Valassis Communications, Inc.,* C-4160, 2006 FTC LEXIS 25 (April 19, 2006) (invitation to collude); *In the Matter of Sony Music Entertainment, Inc.,* C-3971, 2000 FTC LEXIS 95 (Aug. 30, 2000) (minimum advertised price policy).

against discounters.[5] Alternatively, NAMM members could lessen price competition in local retail markets. Any or all these strategies may result in higher prices and harm consumers of musical instruments. Any savings from lower manufacturing costs would be reserved to NAMM members, and not shared with consumers in the form of lower retail prices.

The potential for competitive harm from industry-wide discussions must be weighed against the prospect of legitimate efficiency benefits. Here, the Complaint alleges that no significant pro-competitive benefit was derived from the challenged conduct. The Commission does not contend that the exchange of information among competitors is categorically without benefit.[6] Rather, the allegation is that here – taking into account the type of information involved, the level of detail, the absence of procedural safeguards, and overall market conditions – the exchange of information engineered by NAMM lacked a pro-competitive justification.

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[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 with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement.

The Court also observed that antitrust condemnation may be appropriate where resale price maintenance policies are adopted or enforced pursuant to an agreement among manufacturers.

> Resale price maintenance may, for example, facilitate a manufacturer cartel. . . . An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers. . . . To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel [*i.e.*, a manufacturer cartel or a retailer cartel], it, too, would need to be held unlawful under the rule of reason.

Id. at 2717-18.

[6] *See United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (explaining that the exchange of information can, in some circumstances, increase economic efficiency and render markets more, rather than less, competitive). *See also* Richard A. Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 Geo. L. J. 1187, 1193-97 (1979).

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 information among musical instrument manufacturers and dealers relating to the retail price of musical instruments or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer. The proposed Order also enjoins NAMM from facilitating any musical instrument manufacturer or dealer in entering into or enforcing any agreement between or among musical instrument manufacturers or dealers relating to the retail price of any musical instrument or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer.

In addition, the proposed Order requires NAMM to institute an antitrust compliance program. The proposed Order requires, *inter alia*, the review by antitrust counsel of all written materials and prepared remarks by any member of NAMM's board of directors, employee, or agent of NAMM relating to price terms and minimum advertised price policies; the provision by antitrust counsel of appropriate guidance on compliance with the antitrust laws; and annual training of NAMM's board of directors, agents, and employees concerning NAMM's obligations under the Order.

The proposed Order would not interfere with the ability of NAMM to engage in legitimate trade association activity, including its sponsorship of trade shows and other events. The proposed Order explicitly excludes from its prohibitions the ordinary commercial activities of NAMM's members on the show floor, and any conduct protected by the *Noerr-Pennington* doctrine. In addition, the proposed Order excludes from its prohibitions the publication or dissemination of aggregated survey data, the sharing of best practices and training materials, and the communication of information relating to creditworthiness, product safety, and warranty issues.

The proposed order will expire in 20 years.